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MANAGING THE BURDENS IMPOSED ON MOTIONS FOR SUMMARY JUDGMENT IN CALIFORNIA: THE 1992 AND 1993 AMENDMENTS TO CCP 437C

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I. INTRODUCTION

Sixty-three years after the enactment of a law providing for motions for summary judgment,[1] the California legislature undertook to define the evidentiary burdens imposed on such motions. This was done by adding subdivision (n) to California's summary judgment statute, Code of Civil Procedure section 437c.[2]

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1. CAL. CIV. PROC. CODE § 831d, 1929 Cal. Stat. ch. 494, at 857-58 (repealed 1933). An early form of summary judgment came into existence in California in 1925 when the legislature enacted Code of Civil Procedure section 831f. This provision remained in effect only until 1929. Under section 831f, summary judgment could be entered after a hearing if there were no substantial factual conflicts. *See* 1925 Cal. Stat. ch. 436, at 946. Section 831f required oral proceedings in open court. Unlike summary judgment under Code of Civil Procedure section 831d, which replaced it, section 831f was not a motion procedure.

2. California Civil Procedure Code section 831d, 1929 Cal. Stat. ch. 494, was repealed in 1933 in favor of California Civil Procedure Code section 437c, which has remained California's summary judgment statute. Section 437c reads in relevant part:

> (n) For purposes of motions for summary judgment and summary adjudication:
>
> (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.
>
> (2) A defendant or cross-defendant has met his or her burden of

Until the legislature enacted subdivision (n) in 1992,[3] decisional law defined the burden imposed on the party moving for summary judgment. Under *Barnes v. Blue Haven Pools,*[4] the burdens imposed on motions for summary judgment were substantial. *Barnes* imposed on the party moving for summary judgment not only the burden of production,[5] whether or not it would bear that burden at trial,[6] but also required the moving party to present sufficient evidence to shift the burden of production to the opponent of the motion.[7] The party moving for summary judgment had to negate the opponent's case before the motion could be granted.[8] This meant that the party moving for summary judgment was required to propound evidence of sufficient probative force to show that it was entitled to judgment, even if it did not bear the burdens of proof and production at trial.[9]

Barnes was not an aberration. Until the United States Supreme Court decided *Celotex Corp. v. Catrett*,[10] federal and California law on the burden of the party moving for summary judgment were for all practical purposes identical.[11]

Celotex abrogated the federal rule that imposed an

> showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action.

In 1993 subdivision (n) became subdivision (o). *See infra* note 20 and accompanying text.

3. 1992 Cal. Stat. ch. 1348, at 6702-03.

4. 81 Cal. Rptr. 444 (Ct. App. 1969).

5. *See* discussion *infra* Part I.C. The burden of producing evidence, or the burden of production, is the "[o]bligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." CAL. EVID. CODE § 110 (West 2000). The burden of production is central to summary judgment and is not to be confused with the burden of proof, *i.e.*, the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. *See id.* at § 115.

6. *See Barnes*, 81 Cal. Rptr. at 447; *see also* discussion *infra* Part I.D.

7. *See* discussion *infra* Part I.D. The burden of production is shifted to the opponent when the proponent produces evidence of such probative force that a determination in its favor is required in the absence of countervailing evidence. *See* Cal. EVID. CODE § 550 (citing Law Revision Commission Comment to section 550).

8. *See Barnes*, 81 Cal. Rptr. at 447.

9. *See id.*

10. 477 U.S. 317 (1986).

11. *See* discussion *infra* Part I.B.

evidentiary burden on motions for summary judgment without regard to the allocation of the burdens of proof and production[12] at trial and ultimately displaced *Barnes* as the law of California summary judgment.[13]

The changes that *Celotex* wrought in federal law and practice were the subject of much debate and discussion after the decision came down in 1986.[14] The terms of this debate were complicated by the fact that the Supreme Court handed down two other important decisions about summary judgment at about the same time it decided *Celotex*.[15] However, in hindsight, the weight of authority is that, after *Celotex*, federal courts do not require the party moving for summary judgment to introduce any evidence in order to prevail on a summary judgment motion when that party does not bear the burdens of proof and production at trial.[16] *Celotex* has not had a like effect on California summary judgment.[17]

In California, the direct significance of *Celotex* is that it helped to bring about subdivision (n) of the Code of Civil

12. *See* discussion *infra* Part I.B.

13. *See* discussion *infra* Part I.E.

14. *See* EDWARD BRUNET ET AL., SUMMARY JUDGMENT – FEDERAL LAW AND PRACTICE (1994). Chapters 2 and 3 canvass the cases and commentary on *Celotex* and its significance to federal summary judgment. The response of the lower federal courts to *Celotex* was to reduce or even ignore the evidentiary burden imposed on the party moving for summary judgment. *See id.* at 60-63. Early commentary on *Celotex* was divided between those who welcomed the decision as strengthening summary judgment in its role in identifying factually unsupported cases (*see, e.g.*, Jack Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); John Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227 (1987)) and those who concluded that *Celotex* created more confusion than light about the evidentiary burdens imposed on motions for summary judgment. *See, e.g.*, Linda Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433 (1987); Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 (1988).

15. These two decisions are of limited relevance to this paper. They are *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

16. *See* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2727, at 474 (3d ed. 1998). "[A]s established in *Celotex*, it is not necessary for the movant to introduce any evidence in order to prevail on summary judgment." *Id.* (citing, *inter alia*, Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)); *see also* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.13[1], at 56-138 (3d ed. 1997).

17. *See* discussion *infra* Part I.F.

Procedure section 437c in 1992[18] and further amendments in 1993 when, among other things,[19] subdivision (n) became subdivision (o).[20] As the California Court of Appeals's review of the legislative history of the 1992 and 1993 amendments[21] demonstrates, one of the objectives of the 1992 and 1993 amendments to section 437c was to legislatively overrule *Barnes v. Blue Haven Pools.*[22] The statute that accomplished

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18. *See supra* note 2; *see also* discussion *infra* Part I.E.

19. In 1993, section 437c was amended with provisions relating to summary adjudication (*see* subdivision (m)(1)-(2), Cal. Stat. ch. 276, at 1972 (1993)) and with a new subdivision (n) that defined when a cause of action "has no merit." "A cause of action has no merit if either of the following exists: (1) One or more elements of the cause of action cannot be separately established, even if that element has been separately pleaded. (2) The defendant establishes an affirmative defense to that cause of action." Cal. Stat. ch. 276, at 1973. Subdivision (n) then became subdivision (o). The 1993 amendment also provided that the party opposing the motion could not rely on its pleadings to show that a triable issue of material fact existed but "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." *Id.* This has been the law since 1950 when *Coyne v. Krempels*, 36 Cal. 2d 257 (1950), was decided.

20. CAL. CIV. PROC. CODE § 437c (West 2000) reads in relevant part:

> (o) For purposes of motions for summary judgment and summary adjudication:
>
> (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. *The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.*
>
> (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. *The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.*

Id. (italics indicate 1993 amendments).

21. *See* Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653 (1995).

22. 81 Cal. Rptr. 444 (Ct. App. 1969).

this relieved the party moving for summary judgment of the burden of producing evidence of probative force sufficient to shift the burden of production to the opponent of the motion.[23] However, it did not relieve the moving party from its obligation, set forth in subdivision (b) of section 437c, to support the statement of undisputed material facts with references to the evidence.[24] The legislature was not alone in deciding to repudiate *Barnes*. A resolution by the State Bar of California supporting the abrogation of the rule of *Barnes* played a role in bringing about the enactment of these amendments in both houses of the legislature.[25]

It turned out that the legislature accomplished far more than to simply overrule *Barnes*. The 1992 and 1993 amendments to section 437c also made summary judgment consistent with the concept of the burden of proof and production as well as with the standard of the sufficiency of the evidence.[26] Largely as a result of the 1992 and 1993 amendments and the interpretation they have received in the courts of appeal, summary judgment fits much more smoothly into the machinery of California civil procedure than was the case prior to these amendments.

A. *Developments in the United States Supreme Court: from Adickes to Celotex*

The development of federal law on the burdens imposed on the parties to a motion for summary judgment has been traced authoritatively elsewhere.[27] This paper covers the development only to the extent that these developments help explain the amendments to section 437c enacted by the California legislature in 1992 and 1993.

> The "traditional" federal rule on motions for summary judgment required all movants including those who did not have the production burden at trial, "[T]o shift an evidentiary burden onto their opponents. This initial 'triggering' burden was generally deemed to be equivalent to the evidentiary burden placed on a party possessing the

23. *See* CAL. CIV. PROC. CODE § 437c(o) (formerly codified at § 437c(n), *see supra* note 2).

24. *See* CAL. CIV. PROC. CODE § 437c(b); *see also* discussion *infra* Part I.F-I.F.2.

25. *See Union Bank*, 37 Cal. Rptr. 2d at 653.

26. *See* discussion *infra* Part I.C.

27. *See, e.g.*, BRUNET ET AL., *supra* note 14, § 2.02, at 44-65.

> burden of production at trial when seeking a directed verdict. In other words, the movant would be required effectively to shift a burden of production onto the nonmovant, by producing evidence sufficient to require a rational finder of fact to find in his favor."[28]

The traditional federal rule imposed a greater burden on the party moving for summary judgment than on a party moving for directed verdict on the same set of facts.[29] The law does not require a party moving for directed verdict to propound evidence to disprove the opponent's case.[30]

Adickes v. S.H. Kress & Co.[31] is a case which prominently illustrates the traditional approach. The plaintiff in this civil rights case was Sandra Adickes, a white woman, who had been refused lunch service in defendant Kress's store in Hattiesburg while in the company of six African American students. After service was refused, Adickes was arrested for vagrancy by two policemen.[32] Adickes had to show that a conspiracy existed between Kress and the police officers.[33]

Kress moved for summary judgment based on the affidavits of the store manager, the two arresting officers, and the chief of police, all of which stated that the store manager

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28. *Id.* The "traditional rule" held sway in the days of the Warren Court in such decisions as *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253 (1967), and *Norfolk Monument Co. v. Woodlawn Mem'l Gardens, Inc.*, 394 U.S. 700 (1969), and enjoyed the support of prominent commentators. *See, e.g.*, Martin Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 752 (1974) (citing 6 MOORE ET AL., *supra* note 16, § 56.15[3], at 2342). The occasional critical comment pointed out that imposing a stringent burden on the moving party weakened the role of summary judgment in identifying factually deficient cases, a role taken over from the demurrer, *i.e.*, the motion to dismiss, and assigned to summary judgment. *See, e.g., id.* at 754. Thus, Professor Louis argued in 1974 that it should be enough if the moving party demonstrates the probability, rather than the "near certainty," that the opposing party could not get to the jury at trial. *Id.* at 753. Professor Louis conceded that "[n]o discovered opinion" supported such a test. *Id. See also* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Also see *infra* Part I.C. for a short summary of California law defining the burden of production and the burden of proof and the significance of the former to summary judgment.

29. *See* BRUNET ET AL., *supra* note 14, § 2.02, at 46 (citing *Adickes*, 398 U.S. at 144 and 6 MOORE ET AL., *supra* note 16, at § 56.15[3]).

30. *See* 7 WITKIN, CALIFORNIA PROCEDURE §§ 419, 431 (4th ed. 1997) (only the nonmovant's evidence is considered on a motion for directed verdict or nonsuit).

31. 398 U.S. 144 (1970).

32. *See id.* at 146-48.

33. *See id.* at 148, 150-52.

had not requested that Adickes be arrested.[34] Kress also relied on the fact that Adickes had admitted in her deposition that she had no personal knowledge of any communication between any Kress employee and the police.[35] Adickes's theory in opposition to the motion was that police officers had been present in the store on the day she was arrested. She supported this theory with two inadmissible statements, *i.e.*, one an unsworn statement and the other a hearsay statement.[36] Thus, Adickes effectively failed to controvert the facts upon which Kress's motion was predicated, although her submissions indicated that she could well obtain admissible evidence on this issue. At trial, Adickes would undoubtedly have had the production burden[37] on the existence of a conspiracy between Kress and the police. Thus, if Kress had moved for directed verdict on the same set of facts, the court would have granted the motion since Adickes had propounded no substantial, admissible evidence that the conspiracy existed and would have therefore failed to meet the production burden on this material issue.

Not surprisingly, the district court granted Kress's motion for summary judgment on the grounds that Adickes had failed to show any facts from which a conspiracy could be inferred.[38] The court of appeals affirmed.[39]

The Supreme Court reversed. As the Court explained, Kress had failed to exclude the possibility that police officers had been present in the store the day Adickes had been arrested.[40] If an officer had been present, the jury could have reasonably inferred that the officer and Kress's employees had a "meeting of the minds" and reached an understanding that Adickes should be arrested. The presence or absence of an officer in the store was a "critical element" of the case and Kress had failed to show that no officer had been in the store.[41] In effect, the Court held that a party moving for summary judgment had to produce sufficient evidence to require a judgment in its favor. Thus, unless the party

34. *See id.* at 148, 153-56.
35. *See id.* at 157.
36. *See id.* at 156.
37. *See* discussion *infra* Part I.C.
38. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 148 (1970).
39. *See* Adickes v. S.H. Kress & Co., 409 F.2d 121 (2d Cir. 1968).
40. *See Adickes*, 398 U.S. at 157-58.
41. *See id.* at 158.

moving for summary judgment was able to show that it was entitled to judgment, the law did not obligate the nonmovant to respond to the motion, which the court would in any event deny. This was the case even though the nonmovant had the production burden at trial on the dispositive issue. Accordingly, if Kress's showing had included evidence that no policemen had been in the store, Kress would have been entitled to summary judgment.[42]

Until 1992 when California enacted subdivision (n) of section 437c, California law conformed to the traditional federal rule set forth in *Adickes*.[43] However, while *Celotex Corp. v. Cattret* did not overrule *Adickes*, or even expressly repudiate what had been generally perceived as the "traditional" federal rule, it did offer a "construction" of *Adickes* that was at odds with the general understanding of the evidentiary requirements under the "traditional" rule up to that point.

The plaintiff in *Celotex* alleged that the cause of the decedent's death was exposure to the defendant's asbestos products.[44] The defendant moved for summary judgment and the motion was granted because the plaintiff was unable to show that the defendant's acts or products had caused the decedent's death.[45]

The court of appeals reversed in an opinion that lucidly stated the "traditional" view and explicitly relied on *Adickes*.[46] The court acknowledged that the plaintiff would bear the burden of production at trial on the issue of causation and that her case would be vulnerable to a motion for directed verdict if she failed to meet that burden.[47] However, a party moving for summary judgment carried "the burden of proving the absence of a material issue of fact 'even on issues where the other party would have the burden of proof at trial.'"[48] Since the defendant had not supported its motion with

42. *See* BRUNET ET AL., *supra* note 14.

43. *See* discussion *infra* Part I.D.

44. *See* Celotex Corp. v. Catrett, 447 U.S. 317, 319 (1985).

45. *See id.* at 320. The plaintiff in *Celotex* actually had evidence of exposure of the decedent to asbestos. This evidence had been submitted in opposition to an earlier motion for summary judgment by the defendant. *See id.*

46. *See* Catrett v. Johns-Manville Sales Corp., 756 F.2d 161 (D.C. Cir. 1985).

47. *See id.* at 184-85.

48. *Id.*

evidence "tending to negate" that the decedent had been exposed to defendant's asbestos products, summary judgment had been incorrectly granted.[49]

Without overruling *Adickes*, the Supreme Court reversed. However, the Court substituted for what had been heretofore a relatively clear, if not exacting, standard with one that is both less clear and less exacting. Under the traditional *Adickes* standard the moving party had to propound evidence sufficient to require a rational finder of fact to find in its favor even if the nonmoving party had the burden of production at trial. After *Celotex,* however, the movant bears no such burden.

Following *Celotex*, the burden on the moving party "may be discharged by 'showing' – that is pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case."[50] As for *Adickes,* the Court held that it should "not be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof."[51] While it is not exactly clear what "showing" means, *Celotex* makes this much clear: it certainly does not mean that the moving party must make an evidentiary showing.[52]

Even though it is somewhat uncertain what was meant by "pointing out to the district court," the passage of years has shown that the alarms that sounded about the ambiguities of *Celotex*[53] were to an extent overblown. After all, *Celotex* also held that a party moving for summary judgment in federal court must inform the court of the basis

49. *See id.* at 185.

50. *Celotex Corp.*, 447 U.S. at 325 (1985).

51. *Id.*

52. *See id.* One writer has made an effort to reconcile *Adickes* and *Celotex* by pointing out that the moving party's affidavits in the former case showed there was an issue of fact because the moving party's own affidavits suggested that there might have been a policeman in the store. In *Celotex*, on the other hand, the moving party's affidavits suggested no factual issue. This justified the denial of summary judgment in *Adickes* and the granting of summary judgment in *Celotex*. *See* Kennedy, *supra* note 14 at 246. However, this suggestion does not address the clear language found in *Celotex* that the moving party does not have the burden of showing the absence of an issue of fact if the burden of proof is not on that party at trial. *See id.*

53. *See supra* note 14.

of its motion and "identify those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact."[54] Thus, the moving party in federal summary judgment must certainly do more than simply argue that the opponent's case is not supported by any evidence.[55] In any event, it is clear that the law does not require that the party moving for summary judgment in federal court support the motion with an evidentiary showing if that party does not bear the burdens of proof and production at trial.[56]

B. *The Burden of Proof, the Burden of Producing Evidence, and Summary Judgment*

In referring to the burdens of the party moving for summary judgment and the party opposing the motion, California appellate decisions sometimes characterize those burdens as the "burden of proof."[57] Whether this is correct or not depends on which of two possible meanings of "burden of proof" is intended.

"The term 'burden of proof' is often used in two senses: (a) the secondary meaning of the burden of *initially producing* or *going forward* with the evidence. (b) The primary meaning of the burden of *proving the issues* of the case."[58] If "burden of proof" is understood to refer to the burden of producing evidence, references to the "burden of proof" when discussing summary judgment are appropriate. It is the burden of producing evidence, or the production burden, that is the standard that applies to summary judgment.[59]

The "burden of proof" in its primary meaning is resolved in front of and by the jury. When a case gets to the jury, the

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54. *Celotex*, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)).

55. *See* 11 MOORE ET AL, *supra* note 16, § 56.13[1], at 56-136 (citing, *inter alia*, Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1564 (11th Cir. 1989)) (movant cannot meet its burden merely by asserting that summary judgment should be granted; movant must direct court's attention to the legal and factual contentions and the material relied on in support of the motion); *see also* 10A WRIGHT ET AL., *supra* note 16, § 2727, at 472 (detailing the ways in which a movant can satisfy his burden to show that there are no genuine issues of fact).

56. *See* 10A WRIGHT ET AL., *supra* note 16, § 2727.

57. *See, e.g.*, Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653, 659 (Ct. App. 1995).

58. 1 WITKIN, CALIFORNIA EVIDENCE § 127, at 113-14 (3d ed. 1986).

59. *See infra* pp. 111-14.

proponent of that case must meet its burden of proof. "'Burden of proof' [in its primary sense] means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."[60] On the other hand, the burden to produce evidence is the burden to satisfy the judge that the party has a quantity of evidence *"fit to be considered by the jury* and to form a reasonable basis for the verdict."[61] The burden to produce evidence is a "duty toward the judge" and the judge will rule against the party if the burden is not satisfied.[62]

> The concept of the production burden is addressed to the court's function, not the jury's. It is simply a device whereby the court determines whether, if the trial were stopped at any given point, it would send the case to the jury. If not, the court decides the case and the jury has no role to play. If the case is sent to the jury, the production burden drops out of the case and has no role to play. The jury will be concerned only with the persuasion burden [burden of proof in its primary sense].[63]

As the Evidence Code puts it somewhat cryptically, the "'[b]urden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue."[64]

A motion for summary judgment is not decided by the trier of fact but by the judge, nor is it decided in terms of the "requisite degree of belief concerning a fact in the mind of the trier of fact."[65] Thus, a motion for summary judgment is not decided in terms of the burden of proof in its primary sense. This is self-evident.[66]

It is the burden of producing evidence or the production burden that provides the standard for determining the

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60. CAL. EVID. CODE § 115 (West 2000).

61. 9 JOHN A. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2487 (Chadbourn rev. ed. 1995).

62. *See id.*

63. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 7.7, at 325-26 (4th ed. 1992).

64. CAL. EVID. CODE § 110 (West 2000); *see also id.* at § 550(a) ("The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.").

65. *See id* at § 115.

66. "The notion of a burden of persuasion speaks to assessing the quality and quantity of proffered proof, a task within the jury's province. Therefore, it is an inappropriate function for the judge on a summary adjudication." Mullenix, *supra* note 14, at 471.

sufficiency of evidence presented on a motion for summary judgment.[67]

The production burden has two aspects. First, it is the party with the production burden who has the duty of going forward with the evidence at trial.[68] Second, the production burden requires the party with that burden to produce *sufficient* evidence. Summary judgment is not concerned with the first of these aspects since it applies to trials. However, summary judgment is greatly concerned with the legal *sufficiency* of the evidence. The party moving for summary judgment as well as the opponent of the motion must produce evidence that is *sufficient*, that is, evidence that meets a certain standard.

The standard by which it is determined whether the evidence is sufficient depends on whether the evidence is direct or circumstantial.[69] Direct evidence is evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.[70] Thus, direct evidence offered in support of a proposition will "justify or warrant a finding by the trier that the fact existed."[71] Certainly, nothing more can be asked of the

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67. "The standard for granting summary judgment, like both the directed verdict and judgment n.o.v. motions, is concerned exclusively with the burden of production." BRUNET ET AL., *supra* note 14, at 45. "The only true burdens that exist at summary judgment are burdens of production of evidence; whether these production burdens have been satisfied is the relevant issue in considering the motion." Mullenix, *supra* note 14, at 471.

68. *See* 9 WIGMORE, *supra* note 61, § 2487.

69. *See* People v. Goldstein 293 P.2d 495, 499-500 (Cal. Ct. App. 1956) (citing Blank v. Coffin, 20 Cal. 2d 457, 460 (1942)):

> *[D]irect evidence* is that which is applied to the fact to be proved, immediately and directly, and without the aid of any intervening fact or process: as where, on a trial for murder, a witness positively testifies he saw the accused inflict the mortal wound, or administer the poison. *Circumstantial evidence* is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. An inference is a conclusion as to the existence of a material fact that a trier of fact may properly draw from the existence of certain primary facts.

Id. (citations omitted)

70. *See* CAL. EVID. CODE § 410.

71. JAMES, JR. ET AL., *supra* note 63, § 7.11, at 341.

proponent than to propound a fact, which, if true, "conclusively establishes a fact." It is also logical that if the moving party propounds no evidence, the showing cannot be sufficient.[72]

For circumstantial evidence, the rule at trial is that the inference the proponent seeks to draw must be more reasonable or probable than the conflicting inference.[73] The proponent has not met its burden when conflicting inferences to be drawn from the evidence are of equal weight.[74] However, circumstantial evidence "need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived by the jury."[75] This rule is fair and logical. No more can be fairly expected of a party who relies on circumstantial evidence than a showing that the inference on which it relies is more probable than the conflicting inference.

The court of appeals has applied these settled principles to motions for summary judgment.[76] This is eminently correct and sensible. One of the functions of summary judgment is to eliminate cases that should never go to trial.[77] The court will eliminate a case that is factually insufficient at trial by a motion for directed verdict, nonsuit, or judgment n.o.v. Much time and expense is saved if the court terminates such a case prior to trial and this is, of course, one of the leading rationales for summary judgment. Thus, if the proponent relies on circumstantial evidence to support its position in a motion for summary judgment, the inference that it seeks to draw must be more probable or reasonable than the conflicting inference.

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72. There are reported cases where it was found that the party moving for summary judgment had no evidence on a point critical to its motion. *See, e.g.*, Certain Underwriters at Lloyd's of London v. Superior Court, 65 Cal. Rptr. 2d 821, 823 (Ct. App. 1997).

73. *See* 3 WITKIN, *supra* note 58, § 1796, at 1753.

74. *See, e.g.*, San Joaquin Grocery Co. v. Trewhitt 252 P. 332, 333 (Cal. Ct. App. 1926); 3 WITKIN, *supra* note 58, § 1796, at 1753; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 242 (5th ed. 1984).

75. Chalmers v. Hawkins, 248 P. 727, 730 (Cal. Ct. App. 1926); 3 WITKIN, *supra* note 58, § 1796, at 1753.

76. *See* Leslie G. v. Superior Court, 50 Cal. Rptr. 2d 785, 791-94 (Ct. App. 1996); *see also* discussion *infra* Part I.F.4.

77. *See* Eisenberg v. Alameda Newspapers, Inc., 88 Cal. Rptr. 2d 802, 815 ("The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues.").

The rule requiring the proponent to produce *sufficient* evidence is not always expressed directly. Thus, it has been said that a "scintilla" of evidence is not enough[78] and that a party cannot rely on speculation, surmise, or conjecture.[79] However, the best statement of the rule when a party relies on circumstantial evidence in a motion for summary judgment is that the inference the party relies on must be more probable or reasonable than the conflicting inference. If the proponent's inference is as likely or as reasonable as the conflicting inference, the proponent's evidence is insufficient.[80] This is the identical rule on a motion for directed verdict. The opponent of a motion for directed verdict must produce "evidence of sufficient substantiality"[81] in order to defeat a motion for directed verdict.[82]

C. *The Burden of the Party Moving for Summary Judgment in California Prior to 1992.*

In 1939, the legislature amended section 437c to give defendants the right to move for summary judgment.[83] This required an amendment of the statute setting forth the defendant's objective in such a motion since previously the plaintiff's objective on a motion for summary judgment was stated by the statute to be that there was "no defense to the action." The 1939 amendment to section 437c accordingly provided that the defendant's objective in a motion for summary judgment was to show that "the action has no merit."[84]

If, as a general matter, the moving party has the burden

78. A "[m]ere scintilla of evidence in support of the plaintiff's (nonmovant's) position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). That there once was a "scintilla rule" is a "judicial legend" mentioned in the 1800's only to be repudiated. *See* JAMES, JR. ET AL., *supra* note 63, § 7.11, at 340.

79. *See Leslie G.*, 50 Cal. Rptr. 2d at 791; *see also* discussion *infra* Part I.F.4.

80. *See Leslie G.*, 50 Cal. Rptr. 2d at 791.

81. *See* 7 WITKIN, *supra* note 30, § 419 (citing *In re* Estate of Lances, 216 Cal. 397, 400 (1932)).

82. In the context of directed verdict and nonsuit, California has expressly abrogated the "scintilla of evidence" rule and requires "substantial" evidence to defeat motions for directed verdict/nonsuit/judgment n.o.v. *See* 7 WITKIN, *supra* note 30, §§ 419-20, 432.

83. *See* 1939 Cal. Stat. ch. 331, at 1671.

84. *See id.*

in any motion, and if the objective of a defendant's motion for summary judgment is to show that the "action has no merit," it is logical to conclude that the defendant has the burden to prove exactly that, *i.e.*, that the plaintiff's action had no merit. When the courts added to this that the party moving for summary judgment had to show that it was "entitled to judgment,"[85] it was but a small step to conclude that the defendant had an *affirmative obligation to produce evidence to prove* that the opponent could not support its case with any evidence.

There is also a less logical and a more policy-based reason to impose a relatively severe evidentiary burden on the party moving for summary judgment without regard to whether that party bears the burdens of proof and production at trial. That reason is a belief that summary judgment is an abridgment of, or at least a threat to, the right of a trial by jury and that recourse to summary judgment should therefore be circumscribed, if not discouraged.

There is evidence that the initial judicial attitude toward summary judgment in California included a strong measure of skepticism, if not distrust, of summary judgment. In its first two substantive decisions on summary judgment, *Walsh v. Walsh*[86] and *Eagle Oil & Refining Co. v. Prentice*,[87] the California Supreme Court warned that summary judgment was a "drastic remedy" that should be used "with caution," a mantra that was to be repeated endlessly in the years to come. Even further, it was also said that summary judgment was a "disfavored" remedy.[88] This point of view has been repudiated.[89]

Whether for reasons of policy or logic, or possibly both, California courts opted to require the party moving for summary judgment to propound evidence of such probative force as to *shift the burden of production*,[90] even if the burdens of proof and production were to be borne at trial by the party

85. *See, e.g.*, De Echeguren v. De Echeguren, 26 Cal. Rptr. 562, 565 (Ct. App. 1962).

86. 18 Cal. 2d 439, 444 (1941).

87. 19 Cal. 2d 553, 557 (1942).

88. *See* Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092, 1107 (1988); Sprecher v. Adamson Cos., 30 Cal. 3d 358, 372 (1981).

89. *See* Caldwell v. Paramount Unified Sch. Dist., 48 Cal. Rptr. 2d 448, 457-58 (Ct. App. 1995).

90. *See infra* Part I.E. for a discussion of shifting the burden of production.

opposing the motion. The decision held responsible for this by the legislature[91] as well as by the courts[92] was *Barnes v. Blue Haven Pools*.[93] This may be giving *Barnes* too much credit since the rule that the moving party had to "establish every element necessary to sustain a judgment in his favor" was well in place before *Barnes* was decided.[94] But since the origins of this displaced rule are only a matter of historic interest, it may be well to bow to the conventional wisdom that ascribes this rule to *Barnes*.

Barnes was a personal injury action based on theories of negligence and breach of warranties. The defendant in this case supported its motion for summary judgment in part with interrogatory answers that stated that the plaintiff had no witnesses to prove negligence "at this time"[95] and with a declaration of a plaintiff's expert that he had not reached any conclusions "in regard to safety factors."[96] The *Barnes* court recognized that the plaintiff would have the burden at trial to prove negligence and that if it had no more at trial than was disclosed in the summary judgment motion, the plaintiff would be nonsuited.[97] However, the court concluded that on a motion for summary judgment, the "moving party must generally negative the matters which the resisting party would have to prove at trial."[98] The reason for this was that under section 437c the defendant had the burden of showing that the plaintiff's action had no merit.[99]

Barnes shifted the production burden from the plaintiff to

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91. The legislative history of the 1992 and 1993 amendments shows that the legislature intended to set aside *Barnes*. *See* Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653, 657-65 (Ct. App. 1995).

92. *See id.* at 658-59.

93. 81 Cal. Rptr. 444 (Ct. App. 1969).

94. *See* De Echeguren v. De Echeguren, 26 Cal. Rptr. 562, 565 (Ct. App. 1962); *see also* Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552, 555-56 (Ct. App. 1965). *De Echeguren* goes back as far as the decision in *Gardenschwartz v. Equitable etc. Soc.*, 6 P.2d 322 (Cal. Ct. App. 1937), for the origins of this rule. De Echeguren v. De Echeguren, 26 Cal. Rptr. at 565. *Barnes* itself, in addition to *Canifax*, cites *McClary v. Concord Ave. Motors*, 21 Cal. Rptr. 1 (Ct. App. 1962), and *Kramer v. Barnes*, 27 Cal. Rptr. 895 (Ct. App. 1963), in support of the proposition that the moving party must "negative the matters which the resisting party would have to prove at trial." *Barnes*, 81 Cal. Rptr. at 447.

95. *Barnes*, 81 Cal. Rptr. at 446.

96. *Id.* at 445.

97. *See id.* at 447.

98. *Id.*

99. *See id.*

the defendant. This was recognized by courts and commentators alike.[100] On the one hand, the plaintiff did not have the production burden for purposes of the motion for summary judgment, for if it did, the court would have granted the motion for summary judgment. On the other hand, it was the defendant who had to negate the matters on which the plaintiff had the burden at trial. That is, the court assigned the defendant the very burden that the plaintiff bore at trial. In effect, for the purposes of the motion for summary judgment, this was a reallocation of the production burden.

The rule of *Barnes* did not only reallocate the production burden to the party moving for summary judgment. Requiring the moving party to "negate" the opponent's case, as *Barnes* did, suggested evidence of a probative effect that exceeded evidence that was simply sufficient. This is confirmed by the fact that both the cases and the commentators characterized the moving party's responsibility as one of "proving" that the opponent's case had no merit.[101] In addition to "proving" that the opponent's case had no merit, other like formulations were that the defendant had to "conclusively negate a necessary element of the plaintiff's case,"[102] show that the claims of the adverse party "are entirely without merit on any legal theory,"[103] or show that the moving party was "entitled to judgment as a matter of law."[104] The extent of the defendant's evidentiary burden was never limited to the production of evidence that was simply

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100. *See, e.g.*, Stuart R. Pollack, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419 (1985).

> The moving party carries this burden regardless of whether that party bears the burden of proof at trial. In contrast to a motion for nonsuit at the close of a party's evidence, on a summary judgment motion the moving party cannot point to the absence of evidence by the side that bears the burden of proof, but must come forward with its own evidence to disprove the facts in question.

Id. at 425 (citing *Barnes*, 81 Cal. Rptr. at 446; Matute v. Belco Indus., 142 Cal. App. 3d 433, 438 (1983); Segura v. Brundage, 91 Cal. App. 3d 19, 29 (1979); Fuller v. Goodyear Tire & Rubber Co., 7 Cal. App. 3d 690, 693 (1970)). "This is true whether or not the disputed fact is a negative proposition, whether or not evidence of the fact presumptively is in the possession of the opposing party, and, indeed, whether or not the fact to be disproved is even intelligibly stated in the opposing party's pleadings." Pollack, *supra*, at 425.

101. *See* Pollack, *supra* note 100, at 425.

102. Sackett v. Public Storage Management, 272 Cal. Rptr. 284, 286 (Ct. App. 1990).

103. Ahern v. Dillenback, 1 Cal. Rptr. 2d 339, 341 (Ct. App. 1991).

104. Mann v. Cracchiolo, 38 Cal. 3d 18, 35 (1985).

sufficient to sustain the proposition. Thus, the rule of *Barnes* required the party moving for summary judgment to produce evidence of such probative force that a determination in its favor was required in the absence of countervailing evidence. In other words, a successful motion for summary judgment *shifted the burden of production to the opponent.*[105]

The court cited and applied this rule with a full understanding of its implications which prominently included the circumstance that on the same evidence presented at trial, the court could deny a motion for summary judgment even though the motion revealed that the nonmovant's evidence was so insufficient as to call for a directed verdict.[106] While there was some judicial hand-wringing after *Barnes* about the difficulties faced by the party moving for summary judgment, it is hard to avoid the thought that the *Barnes* rule reflected a simmering antipathy toward summary judgment that otherwise found expression in the endlessly repeated litany that summary judgment was a drastic remedy that had to be employed "with caution."[107]

California courts proved themselves to be clear-eyed

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105. *See infra* Part I.E. for a discussion of shifting the burden of production.

106. The court in *Chevron, U.S.A. v. Superior Court* stated,

> [I]t is immaterial that the few facts offered by petitioners may in reality be all that are available to the parties in the case. While this state of the evidence could have a bearing on whether real parties can prove their case at trial, it is irrelevant to the outcome of a motion under section 437c, where the burden of proof is on the moving defendant, not the responding plaintiff. (Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 179 [165 Cal. Rptr. 38].) We concede it is ofttimes difficult, usually time consuming, normally expensive-and, in some instances, even impossible-for a defendant to meet the demands of the statute. As a consequence, certain cases simply may not lend themselves to resolution by way of summary judgment. (Barnes v. Blue Haven Pools (1969) 1 Cal. App. 3d 123, 128 [81 Cal. Rptr. 444].) Nonetheless, the evidentiary impediments faced by a defendant do not lessen or eliminate the burden of proof imposed by the summary judgment law. (Conn v. National Can Corp., *supra*, 124 Cal. App. 3d at pp. 639- 640.) Contrary to petitioners' contention in its motion filed with the trial court, under section 437c the fact the plaintiff may have "no evidence" with which to prove its case, and is therefore likely to be nonsuited at trial, does not warrant entry of summary judgment in favor of the defendant. (Barnes v. Blue Haven Pools, *supra*, 1 Cal. App. 3d at p. 126; 3 Weil & Brown, Cal Civil Procedure Before Trial (The Rutter Group 1991) ¶ 10.243, p. 10-59.)

5 Cal. Rptr. 2d 674, 679 (Ct. App. 1992).

107. *See, e.g.*, Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 556 (1942).

about *Barnes* and its progeny after the U.S. Supreme Court decided *Celotex Corp. v. Catrett*[108] and before the legislature enacted the 1992 and 1993 amendments to section 437c. The courts recognized the difference between *Barnes* and the new federal rule as laid down in *Celotex,* particularly when it came to the burden imposed by the former and not the latter on the party moving for summary judgment.[109] Notwithstanding developments in the federal courts, California courts stood firmly behind the rule that the party moving for summary judgment not only had the production burden but had to produce evidence of such probative value as to shift that burden to the opponent of the motion, even though this resulted frequently in having to prove that the nonmovant had no evidence.

It may be that the courts themselves could have set aside the *Barnes* rule. Whether or not this might have happened eventually is impossible to say. In any event, in 1992 the legislature amended section 437c with the intent to overrule *Barnes.*[110]

D. *The 1992 and 1993 Amendments to Section 437c*

In enacting the 1992 and 1993 amendments to section 437c, the legislature intended to relieve the party moving for summary judgment of the burdens that *Barnes v. Blue Haven Pools*[111] had imposed. Under *Barnes,* a party who did not bear the burdens of proof and production was required not only to assume the burden of production but was also required to propound evidence of sufficient probative force to shift the burden of production to the nonmovant. The moving party had to show that it was entitled to judgment by negating the opponent's case. This was a rule clearly unfavorable to summary judgment and it was this rule that the legislature intended to change by the 1992 and 1993 amendments.[112]

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108. 477 U.S. 317 (1986).

109. "The new federal view of summary judgment [*Celotex*] has not been adopted by the courts of this state." Biljac Assocs. v. First Interstate Bank, 267 Cal. Rptr. 819, 838 (1990) (Kline, J., concurring).

110. *See* discussion *infra* Parts I.E, I.F.1.

111. 81 Cal. Rptr. 444 (Ct. App. 1969).

112. *See* Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

> [A]fter discussing the plaintiff's burden under the proposed amendment, the report [Sen. Com. on Jud. Com. Rep. on Assem. Bill No. 2616] concluded its discussion of the summary judgment law as

Union Bank v. Superior Court[113] was the first reported decision that addressed the 1992 and 1993 amendments to section 437c, which now appear as subsections (1) and (2) of subdivision (o). The opinion of the court in *Union Bank* makes it amply clear that the intent of the legislature in 1992 and 1993 was to replace the rule of *Barnes* with a more balanced rule.

Before addressing the facts of the case before it, the court in *Union Bank* noted the state of the law prior to the 1992 and 1993 amendments. After reviewing *Barnes v. Blue Haven Pools*[114] and its progeny, the court of appeals turned to the 1992 and 1993 amendments which it concluded "legislatively overruled" *Barnes.*[115] The court examined the legislative history of the 1992 and 1993 amendments at length[116] and concluded that the amendments overruled *Barnes* "insofar as it prohibited a summary judgment motion from being granted when a moving defendant merely relies on a plaintiff's factually devoid interrogatory answers."[117] The court recognized that "there may be other aspects of the legislatively intended changes resulting from the 1992 and 1993 amendments to section 437c" but limited itself to holding that *Barnes* was no longer the law.[118]

But the court in *Union Bank* did not ignore the broader

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follows: "The sponsor points to the federal rules as providing a more equitable standard. Under Federal Rule 56, a party moving for summary judgment is not required to support the motion with affidavits or other similar materials to negate an opponent's claim. (*See Celotex Corporation v. Catrett* (1986) 477 U.S. 317 [91 L.Ed.2d 265, 106 S.Ct. 2548].) This bill would follow the federal example and require each party seeking a summary judgment to prove up its own case without having to negate claims of the opposition." (*See* Sen. Com. on Jud. Com. Rep. on Assem. Bill No. 2616, *supra*, at p. 9.) When Assembly Bill No. 2616 was returned to the lower house for concurrence in Senate amendments, a report prepared by the Assembly Committee of the Floor Coordinator stated, somewhat ambiguously: "Clarifies the burden of proof on summary adjudication and summary judgment motions to codify state law as to the defendant's burden of proof and changes the plaintiff's burden of proof in accordance with the United States Supreme Court's decision of *Celotex Corp. v. Catrett*, (1986) 477 U.S. 317 [91 L.Ed.2d 265, 106 S.Ct. 2548] . . . ."

Id. at 660-61 (internal citations omitted).

113. *Id.*

114. 81 Cal. Rptr. 444 (1969).

115. *Union Bank*, 37 Cal. Rptr. 2d at 658-59.

116. *See id.* at 662-64.

117. *Id.* at 664.

118. *Id.* at 664-65.

implications of overruling *Barnes*.[119] As the court's discussion of the legislative history of the 1992 and 1993 amendments shows, *Union Bank* recognized the objectives of the legislature which extended beyond empowering a defendant to refer to a plaintiff's discovery responses in a motion for summary judgment. The legislative history shows that the intent of the legislature was to relieve parties moving for summary judgment of the burden of "negating" the claims of the opponent and to at least approach the federal standard, which was seen as more equitable.[120]

Union Bank also took careful and repeated note of *Celotex Corp. v. Catrett*,[121] both as to its holding and interpretation in federal practice.[122] But, possibly out of a sense of judicial restraint, the *Union Bank* decision purposefully limited itself to holding that the effect of the 1992 and 1993 amendments was to allow the defendant to rely on the discovery responses of the plaintiff to shift to the plaintiff the burden of showing that there were triable issues of material fact, although the effect of subdivision (o) is much broader than this.[123]

As the *Union Bank* decision showed, the focus of the legislature's concern was the relatively onerous burden imposed by *Barnes v. Blue Haven Pools* on the party moving for summary judgment. But the burden is only *unfairly* onerous when the moving party does not bear the burdens of proof or production. Since, as a general matter, it is usually plaintiffs and not defendants who bear the burdens of proof and production,[124] the legislature decided that plaintiffs and

119. *Barnes* had held that the defendant had to *negate* the plaintiff's case and that the defendant had that burden even if the plaintiff's evidence was so insufficient as to lead to a nonsuit or directed verdict against the plaintiff, if such a motion would be brought at trial against the same evidence. In other words, the broad holding of *Barnes* was that the defendant bore the production burden simply by virtue of making a motion for summary judgment. *See Barnes*, 81 Cal. Rptr. at 447. Overruling *Barnes* also meant that this broader rule was abrogated.

120. *See Union Bank*, 37 Cal. Rptr. 2d at 660-63.

121. 477 U.S. 317 (1986).

122. *See Union Bank*, 37 Cal. Rptr. 2d at 661 n.7, 665.

123. *See id.* at 664-65.

124. The plaintiff has the production burden on the elements of his or her causes of action since a party has the burden of proof as to each fact that is essential to its claim – and the burden of producing evidence as to a particular fact is initially on the party with the burden of proof. *See* CAL. EVID. CODE §§ 500, 550(b) (West 2000). While the defendant is in all likelihood going to have

defendants moving for summary judgment should be treated differently. Thus, plaintiffs and cross-complainants, and defendants and cross-defendants are dealt with, respectively and separately, in subsections (1) and (2) of subdivision (o).

That it is generally the plaintiff who will bear the burdens of proof and production is reflected in the distinctions between the tasks facing plaintiffs and defendants, respectively, under subsections (1) and (2) of subdivision (o).

In order to prevail in the action, the plaintiff, who bears the burdens of proof and production, should meet both burdens. If the plaintiff meets the burden of production, the plaintiff gets to the jury. If the plaintiff meets the burden of proof, he or she is entitled to judgment. But the burden of proof is not at issue on a motion for summary judgment.[125] How then can a plaintiff show on a motion for summary judgment that he or she is entitled to judgment?

If the party with the production burden produces "evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence," that party is certainly entitled to judgment unless, of course, the opponent does propound countervailing evidence. It is also true that when a party has produced "evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence," it has produced enough evidence to shift the burden of production.[126] Putting it another way, when the party with the production burden produces evidence of such probative force that a determination in its favor is required in the absence of countervailing evidence, the production burden shifts to the opponent.[127] Once the burden has shifted, the proponent is entitled to judgment, unless the opponent produces countervailing evidence.[128]

Subsection (1) of subdivision (o) of section 437c describes

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the burden of proof and the burden of production on affirmative defenses, the plaintiff will bear both burdens on the causes of action asserted in the complaint. *See* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL ¶ 10:247 (The Rutter Group 2000).

125. *See* discussion *supra* Part I.C.

126. *See* CAL. EVID. CODE § 550 and Law Revision Commission Comment of 1965.

127. *See id.*

128. *See* discussion *supra* Part I.C.

a situation where the plaintiff has made a showing sufficient to shift the production burden to the opponent, *i.e.*, the defendant.

Under subsection (1) of subdivision (o) of section 437c, the plaintiff or cross-complainant has met his or her "burden" of showing that there is no defense to the action if "that party has *proved* each element of the cause of action *entitling the party to judgment* on that cause of action."[129] Thus, under subsection (1) of subdivision (o), a plaintiff moving for summary judgment must produce evidence of such probative force as to shift the production burden to the defendant before summary judgment can be granted. This means that the plaintiff's showing must be probative enough to exclude the possibility that a rational finder of fact could return a verdict for the defendant.

This makes a good deal of sense. If the plaintiff with the production burden and the burden of proof does nothing more than to propound evidence that is sufficient, one cannot award judgment for the plaintiff.[130] *Sufficient* evidence on the part of the plaintiff does not exclude the possibility that the defendant has evidence that contradicts the plaintiff's evidence. Awarding judgment to the plaintiff who has shown nothing more than that it has sufficient evidence would give the plaintiff prior to trial what it would not have at trial. It would award judgment in the plaintiff's favor without the plaintiff having shown that it has evidence of such probative force as will entitle it to judgment. Therefore, under subsection (1) of subdivision (o), the party with the burden of proof and the burden of production at trial – the plaintiff – must produce evidence sufficient to shift the burden of production. This is evidence of such weight as would entitle the plaintiff to judgment unless it is controverted.

Motions for summary judgment by parties who bear the burdens of production and proof, usually plaintiffs, have not presented the difficulties that are inherent in motions made by parties who do not bear these burdens. Indeed, the rules laid down in subsection (1) of subdivision (o) can be found in a case decided fifty-five years before the legislature enacted the

129. CAL. CIV. PROC. CODE § 437c(o)(1) (West 2000) (emphasis added).

130. *See supra* Part I.C. Sufficient evidence means either direct evidence or, if the evidence is circumstantial, an inference that is more probable or reasonable than the conflicting inference.

first version of subdivision (o) in 1992.[131] Since that early decision, an occasional appellate decision[132] or law review article[133] has recognized that a plaintiff moving for summary judgment, *i.e.*, a party who bears the burdens of proof and production, must produce such evidence as will support a judgment in its favor. Thus, it is not too much to say that subsection (1) of subdivision (o) was declarative of existing law when the legislature enacted it.

The legislature's treatment of a plaintiff's motion for summary judgment, when the moving party will in all likelihood have the production burden at trial, is obviously generic and not limited to the narrow setting of any single case like *Barnes*.[134]

The legislature also affords generic treatment to defendants' motions for summary judgment. Here, however, the situation is different because a defendant is likely to be making a motion for summary judgment *against* the party who has the production burden at trial. It is the plaintiff and not the defendant who has the burden to produce evidence on

131. In *Gardenschwartz v. Equitable Life Assurance Soc.*, 68 P.2d 322 (Cal. Ct. App. 1937), the plaintiff sued in municipal court on three policies insuring him against total and permanent disability. The defendant's answer denied that plaintiff was disabled and denied that he had proven his disability, as he was required to do under the policies. *See id.* at 326. The plaintiff moved for summary judgment. The defendant filed affidavits in opposition but the motion was granted. The defendant appealed. The appellate department of the superior court concluded that the defendant's affidavits were "insufficient to defeat the motion" because they were based on incompetent and inadmissible evidence. *See id.* at 324-25. However, it turned out that the plaintiff's affidavits did not contain "evidentiary facts sufficient to show a cause of action" but were merely conclusions of law. *See id.* at 326. The plaintiff clearly had the burdens of proof and production on the proposition that he had become disabled. *See* CAL. EVID. CODE §§ 500, 550. As the moving party with the burdens of proof and production, he had to demonstrate that he had met the burden of production and that, absent a contrary showing by the defendant, he was entitled to judgment. Or, as subsection (1) of subdivision (o) of section 437c would put it, fifty-five years later, the plaintiff had to "prove" each element of the cause of action "entitling [the plaintiff] to judgment." CAL. CIV. PROC. CODE § 437c(o)(1). Since the plaintiff, and moving party, in *Gardenschwartz* had failed to meet that burden, his motion for summary judgment had to be denied. *See Gardenschwartz*, 68 P.2d at 326.

132. *See, e.g.*, Snider v. Snider, 19 Cal. Rptr. 709, 713-14 (Ct. App. 1962).

133. *See, e.g.*, Pollack, *supra* note 100, at 424-25.

134. *Barnes* involved a defendant's motion for summary judgment in a case where the plaintiff had the production burden at trial. *See* Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444 (Ct. App. 1969). Subsection (1) of subdivision (o) addresses motions for summary judgment by plaintiffs who will generally have the production burden. *See* CAL. CIV. PROC. CODE § 437c(o)(1).

the merits of its cause or causes of action.[135]

Subsection (2) of subdivision (o) provides that the defendant has met his or her burden of showing that the action has no merit if that party "shows" that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action.

The question is whether the defendant's "burden" in moving for summary judgment on the grounds that one or more elements of the cause of action cannot be established must be of a probative force sufficient to shift the production burden.

The answer to this question begins with the observation that under California law the party moving for summary judgment must set forth in a "separate statement" all the material facts that the moving party contends are undisputed[136] and must support each of these material facts with a reference to the evidence.[137] This important requirement is discussed separately below.[138] Whatever the answer to the foregoing question is, it is certain that the party moving for summary judgment must propound evidence in support of the motion.

Any evidence will not do. The evidence submitted in support of the motion must support a "material" fact claimed to be undisputed[139] and it must be admissible evidence.[140]

Returning to the question of whether a party who does not otherwise bear the burdens of proof and production must produce evidence sufficient to shift the production burden, the answer is an emphatic "no." If the defendant must produce evidence that shifts the production burden, *i.e.*, prove that the plaintiff has no evidence with an evidentiary showing sufficiently strong to entitle the defendant to judgment, then *Barnes v. Blue Haven Pools* has been resurrected and the 1992 and 1993 amendments to section 437c are a nullity.

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135. *See* CAL. EVID. CODE § 500 (indicating that the plaintiff has the production burden on the elements of his or her causes of action since a party has the burden of proof as to each fact that is essential to its claim); *see also* CAL. EVID. CODE § 550 (the production burden follows the burden of proof).

136. *See* CAL. CIV. PROC. CODE § 437c(b).

137. *See id*

138. *See* discussion *infra* Part I.F.

139. *See* CAL. CIV. PROC. CODE § 437c(b).

140. *See id.* § 437c(d); *see also* Southern Pac. Co. v. Fish, 333 P.2d 133 (Cal. Ct. App. 1958); Kramer v. Barnes, 27 Cal. Rptr. 895, 898-99 (Ct. App. 1963); Hayman v. Block, 222 Cal. Rptr. 293, 298-99 (Ct. App. 1986).

This, of course, is not what the legislature intended.

On the other side of the spectrum, it cannot be that the defendant can propound evidence that is *less* than *sufficient*, such as circumstantial evidence, where the inference on which the defendant relies is less probable than the conflicting inference.[141] This follows when one considers what would happen if the opponent of the motion would challenge the moving party's *insufficient* evidence with a motion of its own, whether by summary judgment or a motion for directed verdict. The court would have to grant such a motion. Entering judgment in favor of a party whose case is factually so deficient as to be vulnerable to summary judgment or directed verdict is bad law and bad policy. Thus, it is hardly logical to permit a moving party who otherwise does not bear the burdens of proof and production to propound evidence that is insufficient.

Since the evidence propounded by a moving party who does not bear the burdens of proof and production must be *less* than that required to shift the burden of production and *more* than evidence that is insufficient, it appears that the evidence that supports the motion *must be sufficient*. That is, the moving party without the burdens of proof and production must produce either direct evidence or, in the case of circumstantial evidence, the inference propounded must be more probable than the conflicting inference.

A textual analysis of subsections (1) and (2) of subdivision (o) demonstrates that the foregoing deduction is sound. First, subsections (1) and (2) differ in that the former provides that the plaintiff must prove each element of the cause of action sufficient to "entitl[e] the [plaintiff] to judgment" while the latter does not impose this condition on the defendant's showing that there is no merit to the cause of action. Putting it another way, while under subsection (1) the plaintiff must show that it is entitled to judgment, under subsection (2) the defendant must show that one or more elements of the plaintiff's case "cannot be established." The defendant need not disprove every element of the plaintiff's case. In other words, the defendant does not have to "negate" the plaintiff's case.

Second, while under subsection (1) the plaintiff must

141. Direct evidence of a proposition is sufficient evidence. *See* discussion *supra* Part I.C.

"prove" each element of its cause of action, under subsection (2) the defendant need only "show" that the cause of action has no merit. "Show" connotes a lesser burden than "prove." In fact, *Barnes* and its progeny spoke of the defendant's burden to "prove" that the opponent was unable to establish one or more elements of its case.[142] The choice of a less exacting or at least a different term to describe the obligation of the defendant is a further indication that the legislature intended to differentiate between the burdens of the party who normally has the production burden, *i.e.*, the plaintiff, and the defendant.

This analysis of subsections (1) and (2) of subdivision (o) is supported by the fact that if the legislature did not intend to relieve the defendant of the duty to shift the burden of production when the plaintiff has that burden, then *Barnes* has not been overruled and the 1992 and 1993 amendments to section 437c would be meaningless. Yet, as the court of appeals demonstrated convincingly in *Union Bank v. Superior Court,*[143] *the* very objective of these two amendments was to overrule *Barnes*.[144] It was *Barnes* that had required the party without the production burden to assume the burden of disproving or negating the plaintiff's claim and had imposed no burden whatsoever on the plaintiff until the defendant had succeeded in doing so – even though the plaintiff would have that burden at trial and even though the plaintiff's opposition to the motion for summary judgment showed that the plaintiff could not meet that burden.[145] It was this anomaly that the legislature intended to remove by enacting the 1992 amendment to section 437c.

The "burden" referred to in subsection (2) of subdivision (o) that is imposed on the defendant is therefore met by the presentation of *sufficient evidence*, either direct evidence or, if circumstantial, by an inference or inferences that are more probable than the conflicting inferences.[146]

Difficulties arise when the moving party seeks to prove a negative by circumstantial evidence, that is, that the opponent has no evidence on one or more issues that are

142. *See supra* note 100 and accompanying text.
143. 37 Cal. Rptr. 2d 653 (Ct. App. 1995).
144. *See id.* at 660-64.
145. *See* discussion *supra* Part I.D.
146. *See* discussion *supra* Part I.D.

material to its case. The moving party in such cases takes what some courts have dubbed the "no evidence approach."[147] But whatever the "approach," it must rest on evidence that is sufficient.

In cases involving the "no evidence" approach, the moving party usually relies on circumstantial evidence from which it seeks to draw the inference that the opponent has no evidence. This circumstantial evidence is almost always based on evidentiary facts[148] composed of discovery requests propounded by the moving party and the nonmovant's responses thereto.[149] The inference that the moving party seeks to draw from these evidentiary facts is that the nonmovant has no evidence on a given issue or issues.

Of course, nothing prohibits the moving party from producing evidence probative enough to justify a judgment in its favor, *i.e.*, from making a showing sufficiently strong to meet the old test under *Barnes v. Blue Haven Pools*.[150] Some courts have referred to this as the "tried and true technique" of showing that an essential element of the plaintiff's case cannot be established.[151]

If the "burden" referred to in subsection (2) of subdivision (o) is *not* the production burden, then what is it that "shifts" under this provision? The statute provides the answer. If the defendant and moving party (without the production burden) has "shown" that one or more elements of the cause of action cannot be established, the burden "to show that a triable issue of one or more material facts exists"[152] shifts to the party with the production burden. *However, it is not the production burden that has shifted.* The production burden has been on the plaintiff all along. After the movant has "shown" that one or more elements of the cause of action cannot be established, what has shifted is *the burden to show that a triable issue of*

147. *See* Aguilar v. Atlantic Richfield Corp., 92 Cal. Rptr. 2d 351 (Ct. App. 2000), *review granted* and opinion superceded by 96 Cal. Rptr. 2d 441 (Ct. App. 2000).

148. *See* People v. Goldstein, 293 P.2d 495, 500 (Cal. Ct. App. 1956).

149. *See, e.g., Union Bank*, 37 Cal. Rptr. 2d at 653; Villa v. McFerren, 41 Cal. Rptr. 2d 719 (Ct. App. 1995); Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360 (Ct. App. 1999).

150. 81 Cal. Rptr. 444 (Ct. App. 1969).

151. *See* Brantley v. Pisaro, 50 Cal. Rptr. 2d 431, 436 (Ct. App. 1996) (citing Chevron U.S.A., Inc. v. Superior Court, 5 Cal. Rptr. 2d 674, 679 (Ct. App. 1992)); *see also Aguilar*, 92 Cal. Rptr. 2d at 351.

152. CAL. CIV. PROC. CODE § 437c(o)(2) (West 2000).

material fact exists.

Where the defendant's motion for summary judgment is based on the contention that the action has no merit because there is a complete defense to the action,[153] it is very likely that the defendant has the burdens of proof and production on the defense. There is at least one post-1992 appellate decision where this was the case.[154] In such cases, the moving defendant must produce evidence that shifts the production burden, just as in the instance of a plaintiff with the burdens of proof and production.

Subdivision (o) as it reads now does not make allowance for a defendant's motion for summary judgment when, as in the instance of an affirmative defense, the defendant bears the burdens of proof and production. Assembly Bill No. 843,[155] which did not pass, would have expressly recognized that the "moving party" would not have to "negate" the elements of a cause of action or defense "on which the nonmoving party bears the burden of proof."[156] This would have predicated subdivision (o) directly on the allocation of the burdens of proof and production, rather than more indirectly on the position the party occupies in the litigation. Federal law speaks more directly to this issue, as did Assembly Bill No. 843.[157]

Assembly Bill No. 843 would have been a step in the right direction. While the distinction between plaintiffs and defendants made by subdivision (o) is generally workable because the burdens of proof and production usually fall to the former and not the latter, the actual distinction is between parties who bear the burdens of proof and production

153. *See id.*

154. *See* discussion *infra* Part I.F.6; *see also* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197 (Ct. App. 1995).

155. A.B. 843, 149th Leg., Reg. Sess. (Cal. 1997).

156. *Lloyd's of London*, 65 Cal. Rptr. 2d 821, 823 (Ct. App. 1997).

157. *See, e.g.*, Edison v. Reliable Life Ins. Co., 664 F.2d 1130, 1131 (9th Cir. 1981) (holding that an insurer who brings a declaratory judgment claim must demonstrate no realistic possibility that the fact finder will find policy language at issue); *see also* United Mo. Bank of Kansas City, N.A. v. Gagel, 815 F. Supp. 387, 391 (D. Kan. 1993) (indicating that a movant with the burden of persuasion must make a prima facie case of each essential element of its claim, as well as negating any affirmative defenses of the nonmovant, in order to obtain summary judgment); 11 MOORE ET AL., *supra* note 16, § 56.13[1] (if movant bears the burden of persuasion, he must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it).

and parties who do not bear these burdens.

E. *The Impact of Subdivisions (b) and (c) of Section 437c on the 1992 and 1993 Amendments*

Subdivisions (b) and (c) of section 437c have an important impact on the operation of subdivision (o).[158] Subdivision (b)

158. *See* CAL. CIV. PROC. CODE § 437c(b)-(c) (West 2000):
(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion. Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion. Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. Evidentiary objections not made at the hearing shall be deemed waived. Sections 1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section. Any incorporation by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.
(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material

and (c) set forth the requirements of a motion for summary judgment and of the opposition to the motion. These requirements directly affect what is meant by the term "burden" in subdivision (o).[159]

The fundamental requirement imposed by subdivisions (b) and (c) is that a motion for summary judgment must be made, opposed, and decided in terms of *evidence.* Neither party can meet its burden without a reference to the evidence.[160] And it is no mystery what evidence is. Evidence is "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."[161]

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[162] In determining whether the papers show that there is a triable issue as to any material fact, the court is required to consider all the evidence, including inferences that are reasonably deducible from the evidence.[163] "All the evidence" is the evidence that is found in the submissions of the party moving for summary judgment and the party opposing the motion.

Furthermore, the evidence in support of a motion for summary judgment must be filed in a separate statement[164] and an opposition to a motion for summary judgment must be made in response thereto. The motion must set forth all the material facts that the moving party contends are undisputed[165] and "each of the material facts stated shall be followed by a reference to the supporting evidence."[166] On the other hand, the opposition's response must indicate whether the opponent agrees or disagrees that the facts are

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fact.

Id.

159. *See supra* note 20 (reprinting CAL. CIV. PROC. CODE § 437c(o)).

160. There are cases where there are no triable issues as to any material fact but where questions of law need to be decided before judgment can be entered. But even in these cases the moving party has to submit a statement of undisputed facts that is supported by evidence.

161. CAL. EVID. CODE § 140 (West 2000).

162. CAL. CIV. PROC. CODE § 437c(c).

163. *See id.*

164. *See id.* § 437c(b).

165. *See id.*

166. *Id.*

undisputed.[167] If the opponent contends that the fact is disputed, the opponent must support that with a reference to supporting evidence.[168] The opponent is also required to set forth any other material facts that the opponent contends are disputed and these material facts must also be supported by a reference to the supporting evidence.[169]

Some appellate courts have held that even after the 1992 and 1993 amendments to section 437c it is not enough to simply "suggest the possibility that the plaintiff cannot prove its case"[170] and that merely arguing that the nonmovant has no evidence is not enough.[171] Subdivision (b) requires the party moving for summary judgment to set forth "plainly and concisely all material *facts* which the moving party contends are undisputed."[172] An argument or contention by the defendant that the plaintiff has no evidence to support an element of its cause of action is not a fact, it is an argument. Thus, if subdivision (b) is observed and enforced, the defendant will have to state the particular element of the plaintiff's case that is unsupported by evidence in the negative and as a fact. As an example, if the defendant claims that the plaintiff has no evidence that the defendant caused the plaintiff's injuries, the defendant must propound as an undisputed material fact that the defendant did not cause the injury. Having done so, the defendant must then support this assertion with references to the evidence.

The evidence presented in a motion for summary judgment may be direct or circumstantial. But whether direct or circumstantial, it must be *evidence.*[173] The evidence must *support* the fact claimed to be undisputed.[174] Settled rules governing direct and circumstantial evidence provide guidance on when the evidence that supports the asserted undisputed fact is *sufficient.*[175]

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167. *See id.*

168. *See* CAL. CIV. PROC. CODE § 437c.

169. *See id.*

170. Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 207-08 (Ct. App. 1995); *see also* Addy v. Bliss & Glennon, 51 Cal. Rptr. 2d 642, 647-48 (Ct. App. 1996).

171. *See* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 372-73 (Ct. App. 1999).

172. CAL. CIV. PROC. CODE § 437c (emphasis added).

173. *See id.* § 437c(b).

174. *See id.*

175. *See* discussion *supra* Part I.C.

F. *The Effects of the 1992 and 1993 Amendments to Section 437c*

The courts of appeals were quick to recognize the changes that the 1992 and 1993 amendments brought to motions for summary judgment in California. *Union Bank*[176] led the way with a thorough and convincing opinion that found, by enacting the 1992 and 1993 amendments, the legislature intended to overrule *Barnes*.[177]

The demise of *Barnes* raised a number of problems that have been addressed and in part resolved by the courts of appeal. However, some of these resolutions are less than ideal if not erroneous. Yet, these errors are easy to rectify once they have been identified.

There are six areas of concern. First, some courts have suggested that once the party moving for summary judgment has met its burden, it is the "burden of proof" that shifts to the nonmovant.[178] However, it is not the burden of proof or the burden of production that shifts to the nonmovant.[179] Under the terms of the statute, the burden that shifts is the burden "to show that a triable issue of one or more material facts exists."[180] This burden is met by either producing direct evidence or, in the instance of circumstantial evidence, by an inference or inferences that are more probable or reasonable than conflicting inferences – in other words, by sufficient evidence.[181]

Second, there is the question of whether it is enough for the party moving for summary judgment to limit itself to the argument that the opponent's case is not supported by any evidence or whether the party moving for summary judgment must support the motion with some evidentiary showing. The question arises because the 1992 and 1993 amendments were at least influenced by federal practice, if not sparked by it.[182] Under federal practice, the moving party need not support the summary judgment motion with evidence, if the moving

176. 37 Cal. Rptr. 2d 653 (Ct. App. 1995).
177. 81 Cal. Rptr. 444 (Ct. App. 1969).
178. *See Union Bank*, 37 Cal. Rptr. 2d at 663-64; *see also* Chaknova v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 878 (Ct. App. 1999).
179. *See* discussion *supra* Part I.C.
180. *See* discussion *infra* Part I.F.
181. *See* discussion *supra* Part I.C.
182. *See* discussion *supra* Part I.E.

party does not bear the burdens of proof and production.[183] Although this caused some debate among the courts of appeals,[184] the disagreement is more apparent than real. Not even the opinion that supposedly came closest to the federal rule actually endorsed it.[185] California's requirement that the moving party support the facts claimed to be undisputed with evidence[186] excludes the federal rule or any rule that would make it possible for the party moving for summary judgment to make the motion without evidentiary support.

Third, central to the abolition of the rule of *Barnes* that the production burden is re-allocated to the party moving for summary judgment even if the opponent of the motion has that burden at trial, is the recognition that for the purposes of the summary judgment motion the burden of production remains with the party who has it at trial. The appellate courts have endorsed this important principle.[187]

Fourth, the demise of the rule of *Barnes* means that motions may be made *against* the party that has the production burden. But if in such cases the moving party does not need to produce enough evidence to satisfy the production burden, it becomes unclear as to how much evidence the moving party must produce. The courts have supplied the answer to this question, by holding that the moving party must produce evidence that is *sufficient.* If the moving party bases its motion on direct evidence, the evidence will be sufficient since such evidence is sufficient to establish a fact.[188] On the other hand, if the motion is based on circumstantial evidence, the inference that the moving party seeks to draw must be more probable or reasonable than the conflicting inference.[189]

Fifth, in responding to the question of how much evidence a party must propound when it is making a motion for summary judgment against the party with the burden of production, some courts have answered this question by edging perilously close to a standard that would have

183. *See supra* note 2; *see also* discussion *supra* Part I.E.
184. *See* discussion *infra* Part I.F.2.
185. *See* Hunter v. Pacific Mechanical Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995).
186. *See* discussion *supra* Part I.F; *see also* discussion *infra* Part I.F.2.
187. *See* discussion *infra* Part I.F.3.
188. *See* discussion *supra* Part I.C; *see also* discussion *infra* Part I.F.4.
189. *See* discussion *infra* Part I.F.4.

satisfied *Barnes*.[190] This is neither a necessary nor a welcome development.[191]

Sixth, when the motion for summary judgment is made by the party who has the burdens of proof and production at trial, the moving party's evidence must be of such probative weight that it entitles the moving party to judgment, unless the opponent can produce conflicting evidence.[192] Similarly, this applies when defendants move for summary judgment on issues on which they have the burdens of proof and production. Although the statute does not recognize this principle, one appellate decision handed down after 1993 supports this principle.[193]

1. *When the Motion for Summary Judgment is Made* Against *the Party with the Production Burden, the Motion Must Shift the Burden of Showing* That Triable Issues of Material Facts Exist. *The Motion Does Not Shift the Burden of Proof.*

Union Bank v. Superior Court[194] was a pathbreaking decision that steered the courts toward the recognition that the reason for the enactment of the 1992 amendments was to set aside the rule of *Barnes*. *Union Bank* was also a decision that without a doubt reached the correct result.

However, one error crept into the decision that is more of a verbal than a conceptual mistake. The error was the conclusion that "[a] moving defendant may rely on factually devoid discovery responses [of the nonmovant] *to shift the burden of proof* pursuant to section 437c, subdivision (o)(2)."[195] The burden that shifts is not the burden of proof, nor the burden of production.[196] The burden that shifts is the burden to show that triable issues of material fact exist.

A review of the *Union Bank* decision shows how this terminological error crept into the court's decision and that it can be eliminated in future cases without disturbing the reasoning and the result of this decision.

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190. *See* discussion *infra* Part I.F.5.
191. *See* discussion *infra* Part I.F.5.
192. *See* discussion *infra* Part I.F.6.
193. *See* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197 (Ct. App. 1995); *see also* discussion *infra* Part I.F.6.
194. 37 Cal. Rptr. 2d 653 (Ct. App. 1995).
195. *Id.* at 663-64 (emphasis added).
196. *See* discussion *supra* Part I.C.

The plaintiffs in *Union Bank* were investors who had leased a medical scanner from one of the defendants and assigned to Union Bank as security for the lease the assets of NMR Investors Fund I that gave the bank the right to repossess the scanner in the event of a default.[197] The plaintiffs defaulted and Union Bank repossessed the scanner.[198] The plaintiffs sued several defendants, including Union Bank, contending that the defendants had defrauded and conspired to defraud the plaintiffs.[199] The complaint alleged that Union Bank had "participated" in the acts of the defendants.[200]

When served with requests for admission by Union Bank, the plaintiffs refused to admit that the bank had not committed fraud and also refused to admit that the bank had not conspired to commit fraud.[201] When asked by follow-up interrogatories to explain the bases for these denials, the plaintiffs responded that Union Bank had "knowingly and fraudulently" taken the assignments of NMR Investors Fund I's assets to secure the loan.[202] Plaintiffs also "reserved the right" to respond further to the interrogatory.[203] However, the plaintiffs' answers contained no facts upon which these allegations might have been based. On the contrary, plaintiffs admitted that Union Bank had not taken inappropriate action "[i]n connection with its [Union Bank's] role in the transactions . . . in plaintiff's investment in NMR Investor's Fund I."[204]

The plaintiffs had the burden of production when it came to showing that Union Bank had committed fraud and had conspired to commit fraud. Proving fraud was a fact "essential to [the plaintiffs'] claim" which placed the burden of proof on the plaintiffs as well.[205] That is, Union Bank's motion was made against the party with both the burden of production and the burden of proof.

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197. *See Union Bank*, 37 Cal. Rptr. 2d at 654.
198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See Union Bank*, 37 Cal. Rptr. 2d at 655.
204. *Id.* at 658.
205. *See* CAL. EVID. CODE § 500 (West 2000) (stating that "a party has the burden of proof as to each fact the existence of which is essential to its claim").

Union Bank's motion for summary judgment had evidently set forth as material undisputed facts that the bank had "[n]either made any fraudulent representations nor was it a member of a conspiracy to defraud plaintiffs."[206] Furthermore, Union Bank propounded its requests for discovery and the plaintiffs' discovery responses as the evidence that supported these allegedly material undisputed facts.[207] Although the *Union Bank* court did not remark upon it, Union Bank's motion for summary judgment complied with subdivision (b) of section 437c because it was based on *evidence* that *supported* the facts claimed to be undisputed.[208]

The evidence, although circumstantial, *supported* the fact that the bank had not defrauded the plaintiffs and had not participated in a conspiracy. Union Bank had requested the plaintiffs to admit that the bank had not defrauded them and that it had not been a member of a conspiracy.[209] Since the plaintiffs refused to do so, they had to respond to discovery requests that asked them to "state all facts," provide the identities of witnesses, and identify the documents that supported the plaintiffs' response.[210] But the plaintiffs had not furnished any evidence and had not identified any witnesses or documents to support their denials of fraud and conspiracy.[211] They had only stated that they "believed" that the bank had defrauded them and conspired against them.[212]

Barring an admission, evidence that plaintiffs had been asked for facts but had supplied none is circumstantial evidence that supported the reasonable inference that they had no facts. This circumstantial evidence therefore supported the facts claimed to be undisputed, that is, that the bank had not committed fraud and had not participated in a conspiracy.[213] Given that, when asked, the plaintiffs had not

206. *Union Bank*, 37 Cal. Rptr. 2d at 655.

207. *See id.*

208. "Each of the material facts [claimed to be undisputed] shall be followed by a reference to the supporting evidence." CAL. CIV. PROC. CODE § 437c (West 2000).

209. *See Union Bank*, 37 Cal. Rptr. 2d at 654.

210. *See id.*

211. *See id.*

212. *See id.*

213. If the case had gone to trial and the plaintiffs rested their case against Union Bank with no more evidence than they disclosed in their discovery responses, a motion for directed verdict by Union Bank would clearly have been granted.

produced any evidence that the bank had committed fraud, it was more probable than not that there was no evidence of fraud.[214] This was probative circumstantial evidence.[215]

Thus, Union Bank had done all that it was required to do by subdivision (b) of section 437c. It had stated material facts that it claimed were undisputed and had supported those facts with references to the evidence that turned out to be probative circumstantial evidence. The facts claimed to be undisputed were clearly material and the evidence propounded did support those facts.

Everything had been done that needed to be done to shift to the plaintiff the burden to show that a triable issue of one or more material facts existed. Under subdivision (o) of section 437c, the undisputed facts and the evidence that supported those facts "showed" that the plaintiffs' action had no merit in that one or more elements thereof could not be established.

However, at this point the court of appeals took one step in the wrong direction. The court concluded that "a moving defendant may rely on factually devoid discovery responses [of the nonmovant] *to shift the burden of proof pursuant to section 437c, subdivision (o)(2).*"[216] Subdivision (o)(2) of section 437c does not refer to "shifting" the burden of proof.[217] Subdivision (o)(2) provides that a defendant or cross-defendant has met his or her burden of *showing that a cause of action has no merit* if "that party has shown that one or more elements of the cause of action . . . cannot be established or that there is a complete defense to that cause of action."[218] This provision does not assign to the defendant or cross-defendant the burden of proof. The only burden that is assigned to the defendant or cross-defendant is the "burden of *showing* that a cause of action has no merit."[219] The "burden of showing that a cause of action has no merit" can be neither the burden of proof nor can it be the burden of production. It

214. *See Union Bank*, 37 Cal. Rptr. 2d at 654.

215. *See* discussion *supra* Part I.C.

216. *Union Bank*, 37 Cal. Rptr. 2d at 664 (emphasis added).

217. *See* CAL. CIV. PROC. CODE § 437c(o)(2) (West 2000).

218. *Id.* (emphasis added).

219. *Id.* (emphasis added). The defendant or cross-defendant can accomplish this by showing "[he] has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established or that there is a complete defense to that cause of action." *Id.*

is not the former because "'[b]urden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."[220] Establishing the requisite degree of belief concerning a fact in the mind of the trier of fact is definitely not at issue in a motion for summary judgment. And the "burden of showing that a cause of action has no merit" cannot be a reference to the burden of production. If it were, the whole point of subdivision (o)(2), which was to overrule *Barnes*, would be frustrated.

The "burden of showing that a cause of action has no merit" is just that and nothing more. Compliance with subdivision (b) of section 437c is achieved by drafting a "separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed"[221] wherein "[e]ach of the material facts stated [is] followed by a reference to the supporting evidence."[222] This evidence must be either direct evidence or, if circumstantial, the inference relied upon must be more probable than the conflicting inference.[223] In short, the evidence must be legally sufficient.[224]

Once Union Bank had supported its claim that it was undisputed that it had not committed fraud or participated in a conspiracy with references to the evidence, the "burden" that "shifted" was the burden to show that "*a triable issue of one or more material facts exists as to that cause of action.*"[225] Although the plaintiffs in *Union Bank* did respond to the bank's statement of undisputed facts, the court of appeals concluded that the plaintiffs had failed to supply "substantial evidence of deceit on defendant's part or its participation in a fraudulent conspiracy."[226] However, the problem was that the "burden of proof" in *Union Bank,* assuming that the reference was to the burden of producing evidence, did not have to be

220. CAL. EVID. CODE § 115 (West 2000).
221. CAL. CIV. PROC. CODE § 437c(b).
222. *Id.*
223. *See* discussion *supra* Parts I.C, I.F.
224. *See* discussion *supra* Part I.C.
225. CAL. CIV. PROC. CODE § 437c(o)(2) (emphasis added). "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant *to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto.*" *Id.* (emphasis added).
226. *Union Bank*, 37 Cal. Rptr. 2d at 657.

"shifted." It remained all along where it began and belonged, with the plaintiffs.

The court in *Union Bank* may have devised the construct of "shifting" the "burden of proof" in an effort to define the standard, which the party moving for summary judgment must meet in order to require the opponent to respond to the motion. But the statute itself sets forth that standard in clear and pragmatic terms.[227] There is no need to create a "triggering" event.

Union Bank's reference to the shifting of the "burden of proof" has been echoed in subsequent decisions.[228] However, other cases properly refer to the "burden" that "shifts" as a burden to show that triable issues of material fact exist.[229] The latter conforms to the statute and is the proper articulation of the rule.

2. *An Evidentiary Showing is Required to Support a Motion for Summary Judgment.*

In federal law and practice, the party moving for summary judgment need not support the motion with an evidentiary showing.[230] The same is not true of California summary judgment. Subdivision (b) of section 437c requires that the party moving for summary judgment support the facts claimed to be undisputed with references to the evidence.[231] California law precludes a motion for summary judgment that is not supported by such evidence. *Hagen v. Hickenbottom*[232] and *Addy v. Bliss & Glennon*[233] criticized

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227. *See* CAL. CIV. PROC. CODE § 437c(b), (o)(2).

228. *See, e.g.*, Chaknova v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 878 (Ct. App. 1999).

229. *See, e.g.*, Smith v. Maldonado, 85 Cal. Rptr. 2d 397, 401 (Ct. App. 1999).

230. *See* 10A WRIGHT ET AL., *supra* note 16, § 2727; 11 MOORE ET AL., *supra* note 16, § 56.13[1].

231. *See* CAL. CIV. PROC. CODE § 437c(b).

232. 48 Cal. Rptr. 2d 197, 209 (Ct. App. 1995).

233. 51 Cal. Rptr. 2d 642 (Ct. App. 1996).

> We went on to say, however, that we disagreed "with those [such as the court in Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287-1289 (44 Cal. Rptr. 2d 35)] who may be understood to suggest that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case. It is clear to us, from the requirement of the 1992 amendment that a defendant have 'shown that one or more elements of the cause of action . . . cannot be established' (Code Civ. Proc., § 437c, former subd. (n)(2), Stats. 1992, ch. 1348, § 1), that a defendant must make an

Hunter v. Pacific Mechanical Corp.[234] for suggesting that, after 1992, it is enough for the moving party to simply argue, on the federal model, that the nonmovant's case was not supported by evidence. However, a review of *Hunter* shows this criticism to be unfounded.

In *Hunter*, the plaintiff sued multiple defendants for injuries arising from exposure to asbestos. One of those defendants, Pacific Mechanical Corporation (PMC), moved for summary judgment. It appears that the motion for summary judgment complied with subdivision (b) of section 437c. The fact claimed by the defendant to be undisputed was that PMC had not caused Hunter's injuries. As required,[235] the defendant supported this fact with evidence from Hunter's deposition testimony that Hunter was "not familiar" with PMC and that he could not recall ever working in the same area with PMC employees.[236] The inference that PMC sought to draw from these evidentiary facts was that PMC had not caused Hunter's injuries. It appears that the evidence that the moving party propounded supported the fact that PMC did not cause Hunter's injuries. That is, at least minimally,

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affirmative showing in support of his or her motion. Such a showing connotes something significantly more than simply 'pointing out to the . . . court' that 'there is an absence of evidence': before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case. But where such a showing can be made we consider it both fair to the defendant and consistent with efficient administration of justice that the plaintiff be called upon, on risk of summary judgment, to make a prima facie case." (Hagen v. Hickenbottom, *supra*, 41 Cal. App. 4th at p. 186.)

Id. at 647-48.

234. 44 Cal. Rptr. 2d 335 (Ct. App. 1995).

235. *See* CAL. CIV. PROC. CODE § 437c(b).

236. The court said,

[I]n support of its motion, PMC principally relied on Hunter's deposition testimony that he was not familiar with PMC and that he could not recall ever working in the same area with PMC employees. PMC argued that Hunter had made a factually unsupported claim because "there is no evidence that PMC was even at the same job sites as plaintiff. If PMC was not at the same job site, let alone right next to plaintiff at the same job site, it could not have been responsible for plaintiff's alleged exposure to asbestos. Clearly, by failing to show any nexus between the activities of plaintiff and PMC, he cannot establish that PMC breached any alleged duty it may have owed him."

Hunter, 44 Cal. Rptr. 2d at 336.

Hunter's testimony was sufficient circumstantial evidence of the fact that PMC had not caused his injuries.

The criticism leveled at *Hunter* focused on *its* holding that ". . . PMC could effectively show that the elements of causation 'cannot be established' by pointing to an *absence* of evidence to support this element."[237] Conversely, in *Addy v. Bliss & Glennon,*[238] the court interpreted the 1992 amendment as requiring the defendant to make "an affirmative showing in support of his or her motion."[239] Citing *Hagen,* the *Addy* court went on to point out that:

> [S]uch a showing connotes something significantly more than simply 'pointing out to the . . . court' that 'there is an absence of evidence': before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case.[240]

However, not even in federal practice is it enough to simply argue that the court should grant the motion for summary judgment[241] and, more importantly, *Hunter* did not hold that on the issue of causation argument alone was sufficient. The court in *Hunter* had before it a motion that *was* based on an evidentiary showing from Hunter's deposition. And given such an evidentiary showing, it was certainly appropriate for the moving party in *Hunter* to argue – or "point" to – the absence of evidence on the issue of causation. This appears to be the view expressed by the court of appeals in *Lloyd's of London.*[242] In this case, the court held that no California court, including the court in *Hunter*, has ever held that under California law it is enough for the moving party to contend, without evidentiary support, that the opponent of the motion cannot support its case with any evidence.[243]

However, even if their criticism of *Hunter* is not

237. *Id.* at 338 (emphasis added).
238. 51 Cal. Rptr. 2d 642 (Ct. App. 1996).
239. *Id.* at 647.
240. *Id.*
241. *See* discussion *supra* Part I.B.
242. 65 Cal. Rptr. 2d 821, 822 (Ct. App. 1997).
243. *See id.* at 826.

warranted, both *Addy* and *Hagen* are correct in their observation that California law requires that the defendant moving for summary judgment must produce some evidence in support of the motion.[244]

3. *On a Motion for Summary Judgment, the Production Burden Stays with the Party Who Has It at Trial*

In *Hunter,*[245] the court recognized that one of the effects of the 1992 amendment was to leave the burden of production in a motion for summary judgment on the party who bears that burden at trial.[246] This is another way of expressing the change effected by the 1992 amendment. Previously, under *Barnes,* the party moving for summary judgment had to shoulder the production burden even if it would not have that burden at trial.[247] After subdivision (n)[248] was enacted, this was no longer true.

However, the ink was not yet dry on the *Union Bank* decision when *Hunter* was argued and decided.[249] Thus, the plaintiff in *Hunter* was emboldened to contend that *Barnes* should be followed and that the defendant should have the duty of "affirmatively disproving" the element of causation in the plaintiff's case.[250] In rejecting this plea, the *Hunter* court made a significant observation about the burden of production and summary judgment.[251] Pointing to *Celotex Corp. v. Catrett,*[252] the court explained that if the "nonmoving party bears the burden of proof on an issue at trial, the moving party *need not support its summary judgment motion with evidence negating an essential element of the nonmoving party's case* to satisfy its burden."[253] This observation recognized that the burden of production is not reallocated to the party moving for summary judgment simply because it

244. *See* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197 (Ct. App. 1995); *Addy*, 51 Cal. Rptr. 2d at 642; *see also* CAL. CIV. PROC. CODE § 437c(b) (West 2000).

245. Hunter v. Pacific Mechanical Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995).

246. *See id.* at 337.

247. *See* discussion *supra* Part I.C.

248. Subdivision (n) became subdivision (o) in 1993.

249. The opinions in *Union Bank* and *Hunter* were filed on January 12, 1995 and August 23, 1995, respectively. *See supra* Part I.F. for a detailed discussion of the holding in *Union Bank*.

250. *See Hunter*, 44 Cal. Rptr. 2d at 337.

251. *See id.* at 339.

252. 477 U.S. 317 (1986).

253. *Hunter*, 44 Cal. Rptr. 2d at 339 (emphasis added).

was making the motion.

Later, *Hunter* returned to this point in response to the plaintiff's argument that *Union Bank* converted summary judgment into "disguised discovery." The plaintiff's argument on this score appears to have been that permitting the moving party to "simply point" to the absence of evidence made it incumbent on the nonmovant to disclose its entire case and that this could lead to abuse and harassment. However, having previously acknowledged that the 1992 and 1993 amendments wrought an important change in California summary judgment, the *Hunter* court held that "[t]he change is not disguised discovery but simply places the burden of demonstrating there is a triable issue of material fact on the party who bears the burden of proof of that fact at trial."[254]

On the other hand, in *Certain Underwriters*[255] the court expressed a reservation about the point that the burden of production remains with the party to whom it is originally allocated and that it is not reallocated to the party moving for summary judgment for the purposes of the motion.[256] In pointing to the differences between summary judgment under California law and under federal law and practice, the court in *Certain Underwriters* observed that, unlike federal summary judgment, section 437c as amended in 1992 and 1993 does not impose the "burden of proof" for summary judgment on the party who bears the burden at trial "without regard to which party moves for summary judgment."[257] The court explained that in California the burden of proof on summary judgment or summary adjudication is not the same as the burden of proof at trial.[258] In support of this contention, the court pointed to Evidence Code sections 500 and 550 and subdivision (o) of section 437c.[259]

254. *Id.* at 337.

255. 65 Cal. Rptr. 2d 821 (Ct. App. 1997).

256. *See id.* at 825.

257. *Id.* at 826.

258. *See id.*

259. *See id.* Evidence Code section 500 provides that a party has the burden of proof as to each fact the existence or nonexistence of which is "essential to the claim for relief or defense that he is asserting." CAL. EVID. CODE § 500 (West 2000). Evidence code section 550 addresses the burden of production. Subdivision (a) of section 550 provides that the burden of production "as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence," and subdivision (b) allocates the burden of production to the party with the burden of proof. *Id.* at § 550(a)-(b).

The implication of this observation of the court in *Certain Underwriters* is that section 437c imposes certain burdens on the party moving for summary judgment even if that party does not have the production burden at trial.

The implication is correct. While subdivision (b) of section 437c imposes obligations on the moving party that federal practice does not impose,[260] it is also true that only the burden to produce evidence is involved in motions for summary judgment and not the burden of proof.[261] For example, subsection (o) of section 437c does not speak of the "burden of proof" but rather of the "burden of showing that there is no defense to a cause of action" or the "burden of showing that a cause of action has no merit."[262] Neither burden is the same as the "burden of proof" in its primary sense.[263]

This, however, does not mean, and the court in *Certain Underwriters* did *not* hold, that the *burden of production* is reallocated to the party moving for summary judgment simply because it is making a motion for summary judgment. As the court of appeals showed in *Hunter*[264] one of the effects of the 1992 and 1993 amendments was to leave the production burden with the party that will have it at trial.[265] A re-allocation of the burden of production to the party moving for summary judgment simply because it is making the motion would resurrect *Barnes* and nullify the 1992 and 1993 amendments to section 437c. In *Leslie G. v. Superior Court*,[266] the same panel of the court of appeals that decided *Certain Underwriters* expressed support for the principle that on a motion for summary judgment, the burden of production remains with the party who has it at trial.[267]

260. There are no requirements in federal practice to file a statement of material facts claimed to be undisputed, to respond to such a statement, and to support the statement and the response thereto with references to the evidence, as there are under subdivision (b) of section 437c.

261. *See* discussion *supra* Part I.C.

262. CAL. CIV. PROC. CODE § 437c(o)(1)-(2) (West 2000).

263. *See* discussion *supra* Part I.C.

264. Hunter v. Pacific Mechanical Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995).

265. *See id.* at 337.

266. 50 Cal. Rptr. 2d 785 (Ct. App. 1996).

267. *See id.* at 791.

4. *If Circumstantial Evidence Is Presented in Support of or in Opposition to a Motion for Summary Judgment, the Inference Urged by the Proponent Must be More Probable Than the Conflicting Inference.*

There are three possibilities when a party relies on circumstantial evidence. The inference the proponent urges may be *more* probable than the conflicting inference, it may be *as* probable as the conflicting inference, or it may be *less* probable than the conflicting inference. It is only in the first of these three situations that the proponent's evidence is *sufficient*.[268]

Cases decided by the courts of appeals since 1993 provide illustrations of all three of the preceding scenarios and confirm important and familiar rules about circumstantial evidence in the context of motions for summary judgment.

Leslie G.[269] is the leading case on the application of the settled rules of circumstantial evidence to motions for summary judgment. In this case, the inference urged by the plaintiff nonmovant, who had the burden of production, was less probable than the conflicting inference and, therefore, fatal to the opposition of the motion.[270]

The plaintiff in *Leslie G.* attempted to show a landlord's negligence in not repairing a broken security gate in the garage of an apartment building caused her rape by an unknown assailant.[271] The defendant supported its motion for summary judgment with the deposition testimony of the investigating police officers and the plaintiff's expert that it was not known how the assailant entered the garage.[272] Plaintiff's evidentiary fact was of course the broken gate and plaintiff's expert sought to infer from this that the assailant had entered through this gate.[273] The evidentiary facts on which the defendant based its inference that the broken gate was not where the assailant entered were that there were other doors leading into the garage, that these doors, although usually locked, were sometimes left propped open by

268. *See* discussion *supra* Part I.C.
269. 50 Cal. Rptr. 2d 785.
270. *See id.* at 791.
271. *See id.* at 786-88.
272. *See id.*
273. *See id.*

the tenants.[274] The defendant also argued the possibility that the rapist had a key to one of these doors and the possibility that the rapist had been let into the building.[275]

The court noted that the burden of proof on the causation issue was on the plaintiff, "[a]lthough the case is before us on an appeal from a summary judgment."[276] This conforms with the holding of *Hunter* that the burden of proof remains with the party who has it at trial.[277] After stating that the defendant's showing was adequate, the court turned to the plaintiff's burden.[278] In doing so, the court set forth, in unmistakable terms, the burden of a party who relies on circumstantial evidence.[279] It was not enough for the plaintiff

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274. *See* Leslie G. v. Superior Court, 50 Cal. Rptr. 2d 785, 786-88 (Ct. App. 1996).

275. *See id.*

276. *Id.* at 791.

277. *See* Hunter v. Pacific Mechanical Corp., 44 Cal. Rptr. 2d 335, 336-37 (Ct. App. 1995).

278. *Leslie G.*, 50 Cal. Rptr. 2d at 790.

279. The court in *Leslie G.* said,

> [I]n deciding whether a plaintiff has met her burden of proof, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the defendant. (Williams v. Barnett (1955) 135 Cal. App. 2d 607, 612 [287 P.2d 789]; 3 Witkin, Cal. Evidence, *supra*, Introduction of Evidence at Trial, §§ 1795-1797, pp. 1752-1756.) [Para.] We will not, however, draw inferences from thin air. Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are consistent with her theory. Instead, she must show that the inferences favorable to her are more reasonable or probable than those against her. (*See* San Joaquin Grocery Co. v. Trewhitt (1926) 80 Cal. App. 371, 375-376 [252 P. 332] [if it appears that the facts from which an inference is drawn, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for]; Estate of Moore (1923) 65 Cal. App. 29, 33 [223 P. 73] [where the only evidence gives rise to conflicting evidence, there is no proof, only guesses and conjecture].) [2c] Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), Leslie cannot survive summary judgment simply because it is possible that he might have entered through the broken gate. (Brautigam v. Brooks (1964) 227 Cal. App. 2d 547, 556 [38 Cal. Rptr. 784] [an inference cannot be based upon mere possibility]; Estate of Gutierrez (1961) 189 Cal. App. 2d 165, 173 [11 Cal. Rptr. 51] [it is axiomatic that an inference may not be based on suspicion alone, or on imagination, speculation, surmise, conjecture or guesswork]; Reese v. Smith (1937) 9 Cal. 2d 324, 328 [70 P.2d 933] [a

to show that the evidentiary circumstances were consistent with her theory. The plaintiff had to show that the inferences favorable to her were more reasonable or probable than those against her.[280] The court concluded that the inference propounded by the plaintiff was conjectural and based on speculation.[281] In other words, the inference that the plaintiff sought to draw was not evenly balanced with that on which the defendant relied. Thus, the plaintiff had not produced sufficient evidence.[282] Since the plaintiff, as the opponent of the motion, could not show that her case was supported by sufficient evidence, there were no material issues of fact to be tried and the motion for summary judgment had to be granted.

If the inferences are evenly balanced, the moving party's showing is insufficient. A case that provides a good illustration of evenly balanced inferences is *Scheiding v. Dinwiddie Construction Co.*[283] where the court of appeals set out to determine the quantum of "evidence that must be "shown" to support a summary judgment motion in order to require the party opposing the motion to take up the burden of producing countervailing evidence."[284] In this case, the plaintiffs sued for injuries inflicted by, *inter alia*, the Dinwiddie Construction Company who had allegedly exposed Mr. Scheiding to asbestos during his work as a laborer and electrician.[285]

The defendant moved for summary judgment and supported that motion with Mr. Scheiding's interrogatory responses and references to his deposition.[286] The interrogatory responses failed to identify any job site where the defendant had been the general contractor. During the plaintiff's deposition that Dinwiddie had attended, Mr. Scheiding never mentioned the Dinwiddie Construction

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judgment cannot be based on guesses or conjecture]; Krause v. Apodaca (1960) 186 Cal. App. 2d 413, 418 [9 Cal. Rptr. 10] [inferences must be drawn from evidence and not based on mere speculation as to probabilities without evidence]).

Id. at 791-92.

280. *See id.*

281. *See id.* at 795.

282. *See* discussion *supra* Part I.C.

283. 81 Cal. Rptr. 2d 360 (Ct. App. 1999).

284. *Id.* at 361.

285. *See id.* at 362.

286. *See id.*

Company.[287]

"Essentially, Dinwiddie's motion was based on the declaration of defense counsel stating that [Mr. Scheiding] failed to ever mention Dinwiddie in the course of discovery."[288] It is undisputed that during the deposition neither Dinwiddie, nor any other defendant, ever asked [Mr. Scheiding] to identify any jobsite where Dinwiddie had been present. In fact, Dinwiddie asked no questions at the deposition and conducted no other discovery.[289]

Although it is unclear precisely what fact or facts the defendant contended were undisputed, it appears that the defendant propounded as an undisputed fact that it had not caused the plaintiff's injuries.[290] The plaintiff's failure to identify the Dinwiddie Construction Company was, in substance, the evidentiary fact from which the defendant sought to draw the inference that Mr. Scheiding had never shared a worksite with Dinwiddie. This in turn "supported" the fact claimed to be undisputed that Dinwiddie had not caused Mr. Scheiding's injuries. The plaintiffs opposed the motion by claiming that the construction company had not carried the statutory burden of "showing" that the element of causation could not be established.[291] They took the position that Dinwiddie was required to make an "affirmative" showing and could not limit itself to the simple claim that the plaintiffs had no evidence. The plaintiffs went so far as not to dispute Dinwiddie's statement of undisputed fact, except to point out that Robert Scheiding had never been asked whether Dinwiddie was a general contractor at any site where Mr. Scheiding had worked. The plaintiffs maintained adamantly in the trial court[292] and on appeal[293] that reliance

287. *See id.*

288. *Id.*

289. *See* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 362 (Ct. App. 1999).

290. "Dinwiddie's motion for summary judgment . . . argued lack of causation." *Id.*

291. *See id.*

292. *See id.* at 362.

> After issuing a tentative ruling to grant the motion, the court inquired why the plaintiffs had not submitted any declaration saying they could identify Dinwiddie. Counsel . . . Gregory Sheffer [] explained his office had decided against it: "Because had we done that, it would have encouraged Defendants to come and do the same thing. Simply do no discovery, do nothing else, and just say the Plaintiffs don't have any

on Mr. Scheiding's deposition was not enough to "show" that there was no triable issue of fact.[294]

Scheiding turned on the sufficiency of the circumstantial evidence propounded by the moving party. Defendant urged the court to draw the inference from the plaintiffs' discovery responses that Mr. Scheiding had never shared a work site with Dinwiddie. But there were two plausible inferences to be drawn from the circumstance that the plaintiffs' discovery responses, including Mr. Scheiding's deposition, never mentioned Dinwiddie. One was that the plaintiffs' failure to identify Dinwiddie was due to the fact that Mr. Scheiding had never been on a worksite with Dinwiddie. The other inference was that since there were "hundreds" of defendants, the plaintiffs could not be expected to name Dinwiddie unless they were specifically asked to do so. It appears that both inferences were equally reasonable or probable.

The court noted that in previous cases where the moving party had relied on inadequate discovery responses, the discovery requests had been broad enough to require the nonmovant to disclose all of its evidence.[295] Thus, when, as in *Union Bank*, the nonmovant had been asked to "state all facts" on which it based a given contention it could be reasonably inferred that the plaintiff had no facts on a given issue.[296] This had not happened in *Scheiding*. Not only had the moving party failed to propound "state all facts" discovery, it had not even made the simple request that the plaintiffs identify worksites Mr. Scheiding had shared with Dinwiddie. The plaintiffs had not been asked to disclose all the evidence they had on this issue. Thus, it was at least as plausible as not that they did not name Dinwiddie because they had not been asked.

The gist of the court of appeals's opinion about the

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evidence. We are not going to do any work. They have to prepare an opposition." Subdivision (o)(2) of section 437c, he maintained, had not been satisfied because "no discovery specific to this issue was conducted" and Dinwiddie had not made an "affirmative" showing.

293. "On appeal . . . [p]laintiffs contend that without the deposition having particularly addressed Dinwiddie's presence or absence from the jobsites, the initial burden could have been met." *Id.* at 363.

294. *See id.*

295. *See* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 371-72 (Ct. App. 1999).

296. *See id.* (citing Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653, 655-57 (Ct. App. 1995)).

defendant's showing was that it was "entirely possible that plaintiffs could have supplied further information concerning Dinwiddie."[297] If this inference was "entirely possible," it was at least as probable as the inference urged by the construction company that plaintiffs had no evidence. Thus, the evidence on which Dinwiddie relied, that the inference that Mr. Scheiding had never shared a work site with him because he did not voluntarily name the construction company in the discovery responses, was insufficient evidence to support a motion for summary judgment.[298]

Scheiding highlights the principle that when the probabilities are evenly balanced and two inferences are equally plausible, the evidence is insufficient.[299] It is not enough that the probabilities are balanced, the proponent must show that the inference on which he is relying is *more* probable than the one against him.[300] Unfortunately, the court in *Scheiding*[301] slipped away from the rule that when the inferences are evenly balanced, the proponent's evidence is insufficient. The *Scheiding* court concluded that Dinwiddie had not presented evidence but merely argued that the plaintiffs had no evidence,[302] a proposition flatly contradicted by the circumstance that Dinwiddie did present evidence in the form of interrogatory responses and Mr. Scheiding's deposition.[303] The correct result for the right reason eluded

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297. *Id.* The court said,

> [T]he deposition and standard interrogatories in this case did not contain questions aimed specifically at the presence or absence of Dinwiddie at jobsites, and neither of these discovery devices was comparable to an "all facts" interrogatory on the subject. Dinwiddie's presence was key to liability, and Dinwiddie could have pursued further discovery. It is entirely possible plaintiffs could have supplied further information concerning Dinwiddie. After all, their answers to the standard interrogatories detailed over 100 jobsites and work dates over a period of 42 years. And Mr. Scheiding's subsequent deposition, which Dinwiddie attended, spanned five days. *This situation is easily distinguished from the cases on which Dinwiddie relies, in those cases the courts could infer from an incomplete or evasive reply that the plaintiffs had no other facts to support their case.*

Id. at 372-73 (emphasis added).

298. *See id.*

299. *See, e.g.*, Leslie G. v. Superior Court, 50 Cal. Rptr. 2d 785, 791 (Ct. App. 1996).

300. *See id.*

301. 81 Cal. Rptr. 2d 360 (Ct. App. 1999).

302. *See id.* at 373.

303. *See id.* at 362.

the court in *Scheiding* and left only the correct result for the wrong reason.

The situation is of course far simpler when the defendant moving for summary judgment propounds no evidence, direct or circumstantial, that an element of the plaintiff's claim is not supported by any evidence. Such was the case in *Lloyd's of London.*[304] In this case, the plaintiff sued an insurer for its alleged failure to defend and indemnify the plaintiff in several environmental contamination actions.[305] The insurer had declined coverage because the plaintiff had no insurable interest in the properties that were the subject of the underlying litigation while the policies had been in effect.[306] The insurer contended that the policies had been in effect only for "finite policy periods" which did not cover the times that the plaintiff had an insurable interest in the properties in question that were the subject matter of the several environmental contamination actions.[307]

The questions at issue in the case were when the policies were in effect and what were the terms of the policies when they were in effect.[308] The insurer moved for summary judgment, but "did not submit copies of the insurance policies or any evidence of the allegedly 'finite' policy period or of the terms and conditions of those policies."[309] In fact, very little was known about the policies.[310] The plaintiff opposed summary judgment, contending that the insurer had failed to meet its initial "burden of proof" because it had not submitted the policies or any other proof that would suggest that the plaintiff would be unable to establish coverage.[311]

The insurer's motion for summary judgment relied on the

304. 65 Cal. Rptr. 2d 821.
305. *See id.*
306. *See id.* at 822.
307. *See id.*
308. *See id.* at 823.
309. *Id.*
310. *See Lloyd's of London*, 65 Cal. Rptr. 2d at 826. As the court stated,
> We do not know (as [defendant] Lowsley-Williams seems to know or assume) that they are comprehensive general liability policies. We do not know whether they are occurrence policies. We do not know what provisions, if any, they might contain that would be relevant to a decision about whether or when it was that SoCalGas had to have an "insurable interest" in the properties that are the subject of the underlying actions.

Id.
311. *See id.* at 822.

plaintiff's complaint, which alleged that the insurer had issued "various excess liability policies."[312] The complaint alleged the policy numbers and the policy period for each policy, which was "a procedure adopted because there are more than 40 underlying actions involving many carriers and policies issued over a period of 15 years."[313] The insurer contended that these allegations were judicial admissions and that no further evidence of policy periods was required.[314] The complaint, however, did not allege the dates in which the policies were in effect, nor did the moving party supply these dates.[315] The fact that the motion claimed was undisputed was that the policies had not been in effect when the plaintiff had an insurable interest in the properties that were the subject matter of the underlying litigation.[316] The only evidence that could have supported these facts was the actual dates that the policies were in effect. And this evidence was completely missing.[317]

The court noted that there was no case, even after the 1992 and 1993 amendments, that held that "section 437c permits the moving defendant to meet its initial burden without any showing at all."[318] The court concluded that the moving party must make an initial evidentiary showing.[319] This, of course, is correct. Subsection (b) of section 437c requires the party moving for summary judgment to support facts claimed to be undisputed with evidence.[320]

The approach taken by some courts, that the moving party must make a "prima facie" case showing that the plaintiff's case cannot be established, is entirely consistent with the rule that the party moving for summary judgment must rely on inferences that are more probable than the opponent's.[321] This is the equivalent of a motion based on

312. *See id.*
313. *Id.* at 823 n.2.
314. *See id.* at 823.
315. *See id.* at 823 n.2.
316. *See Lloyd's of London*, 65 Cal. Rptr. 2d at 827.
317. *See id.* at 826.
318. *Id.* at 823.
319. *See id.*
320. *See* CAL. CIV. PROC. CODE § 437c(b) (West 2000).
321. *See* Allyson v. Department of Transp., 62 Cal. Rptr. 2d 490, 498 (Ct. App. 1997); *see also* Aguilar v. Atlantic Richfield Corp., 92 Cal. Rptr. 2d 351, 378 (Ct. App. 2000); *cf.* Pacific Tel. & Tel. Co. v. Wallace, 75 P.2d 942, 947 (Or. 1938) (A "prima facie" case is one where the evidence is sufficient to establish a given

circumstantial evidence where the movant has shown that the inference on which it relies is more probable or reasonable than the conflicting inference. Unless contradicted, such an inference will support a judgment in favor of the party urging the inference.

5. *A Summary Judgment Motion Against a Party Who Bears the Burdens of Proof and Production Must be Supported by Sufficient Evidence*

The courts of appeals have interpreted the 1992 and 1993 amendments to require an evidentiary showing on the part of the moving party.[322] This conforms to subdivision (b) of section 437c, which requires the party moving for summary judgment to support each fact clamed to be undisputed with references to the evidence.[323]

Since the moving party must make an evidentiary showing, the question is what standard determines the sufficiency of that showing. As we have seen, when the motion is made against the party with the production burden, the showing in support of the motion must rest on *sufficient evidence of material facts*.[324] Since this is not entirely obvious, there has been some vacillation between a recognition that the *Barnes* standard is now defunct and no longer binding and an almost intuitive "sense" that the moving party must surely make *some sort* of a showing, even in the post-*Barnes* world. However, the search for an acceptable standard has produced some decisions that suggest standards that exceed the requirement of producing *sufficient* evidence in support of the summary judgment motion. That is, there have been some decisions that set a standard that is perilously close to requiring evidence that shifts the production burden. While there is nothing objectionable about the moving party voluntarily propounding evidence probative enough to shift the production burden even if it does not have that burden, *imposing* such a burden on the party without that burden resurrects *Barnes* and renders the 1992 and 1993 amendments meaningless.

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fact and which will remain sufficient to sustain a judgment unless it is contradicted).

322. *See* discussion *supra* Part I.F.2.

323. *See* CAL. CIV. PROC. CODE § 437c(b).

324. *See* discussion *supra* Part I.C.

Villa v. McFerren[325] is one such decision that looks strikingly similar to the *Barnes* ruling. The action in *Villa* was brought for civil conspiracy against a psychiatrist who the plaintiff alleged had conspired with his disability insurer to deprive him of his disability benefits.[326] The insurer had scheduled a psychiatric examination of the plaintiff with the defendant.[327] On February 6, 1992, the plaintiff showed up for the examination with a tape recorder but the defendant refused to proceed with the recorder on.[328] The defendant eventually ordered the plaintiff to leave and reported to the insurer that the plaintiff had cancelled the appointment.[329] The insurer terminated benefits because the plaintiff had failed to submit to an independent psychiatric examination.[330]

The material fact that the defendant claimed was undisputed was that the defendant had not participated in a conspiracy to inflict severe emotional distress on the plaintiff.[331] The only competent evidence that the defendant cited in support of this material fact was the plaintiff's deposition testimony that as of February 6, 1992, the plaintiff did not know how many communications the defendant had with the insurer; and that the only letter the plaintiff had seen was the letter dated January 8, 1992, from the insurer to the defendant, requesting the defendant to perform the psychiatric examination.[332]

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325. 41 Cal. Rptr. 2d 719 (Ct. App. 1995).
326. *See id.* at 720-21.
327. *See id.*
328. *See id.*
329. *See id.*
330. *See id.* at 721.
331. *See Villa*, 41 Cal. Rptr. 2d at 730.
332. *See id.* at 723. The court said,

> The deposition testimony was as follows: "[Q] . . . [A]m I also correct that as of February 6, 1992, [the date of plaintiff's appointment with defendant] you didn't know how many communications [defendant had with the insurer] or what the extent of that communication was? [¶] [A] Exactly. [¶] [Q] As of today, as you sit here today, the only communication, which you are aware of between Dr. McFerren's office and Minnesota Mutual [the insurer], which communications took place on or prior to February 6, 1992, is this letter? [¶] [A] Yes, this letter is the only letter that I have seen. As my counsel said, I saw this today. It is a communication between Minnesota Mutual and the doctor. The letter plaintiff referred to in his deposition testimony set forth the background of the disability claim and requested defendant perform a psychiatric examination.

Id.

The inference that the defendant sought to draw was that the defendant had *not* conspired with the plaintiff's disability insurer to deprive him of his disability benefits.[333] The evidentiary facts upon which this inference was based was that the plaintiff did not know *how many* communications defendant had had with the insurer and that, at the time of his deposition, the plaintiff had seen only one letter exchanged between the defendant and the insurer.[334] But on these facts it is at least as probable, and very possibly less probable, that the defendant did not conspire with the insurer. If it was not known how many, if any, communications had taken place between the defendant and the insurer, and there was only one letter of neutral content from the insurer to the defendant,[335] the inference that the defendant did not conspire with the insurer was at least as likely, if not less likely, than the inference that he did engage in a conspiracy. Thus, since the moving party's evidence was insufficient, the moving party's showing was inadequate and the motion should have been denied.

The court of appeals reached the same conclusion. The court concluded that the defendant's evidence was inadequate because it "failed to contain a declaration or similar evidence proving no agreement or conspiracy existed."[336] The only evidence the defendant had presented was that the plaintiff was "unaware of communication between the defendant and [the insurer] other than a letter" plaintiff was shown on the day of the deposition. Since it was unlikely that the plaintiff would have been present during any communications between the defendant and the insurer, this evidence by itself was insufficient.[337]

The court then described what would have been an adequate showing.[338] The court held that a declaration by the defendant that he had had no communication with the insurer prior to January 8, 1992, that he had never entered into an agreement with the insurer to prepare an inaccurate report, or that he never agreed to prepare a report adverse to

333. *See id.* at 730.
334. *See id.* at 722-23.
335. *See id.* at 722.
336. *Id.* at 729.
337. *See Villa*, 41 Cal. Rptr. 2d at 723.
338. *See id.* at 729.

the plaintiff but favorable to the insurer's interests, would have been adequate to show no conspiracy existed.[339] At the most, the offering of this evidence would have entitled the defendant to judgment, at the least, this would have shifted the burden to the plaintiff to show that the defendant never entered into an agreement with the insurer to prepare an inaccurate report and never agreed to prepare a report adverse to the plaintiff but favorable to the insurer's interests.[340] In other words, the showing that the court of appeals required of the moving party was tantamount to requiring the moving defendant to produce enough evidence to *shift* the *burden of production.*

Although the plaintiff did not prevail,[341] the import of the court's decision in *Villa* was to weaken the 1992 and 1993 amendments to section 437c. Requiring the party that does not have the burden of production to propound evidence probative enough to entitle it to judgment is exactly the rule that the legislature intended to abrogate by the 1992 amendment.

Assume that instead of the plaintiff's evasive answer that he had seen no letters other than the January 8, 1992, letter,[342] the plaintiff had been asked to state all facts upon which the allegation of a conspiracy was based and that he could only point to the January 8, 1992, letter. As in *Union Bank,* this would certainly be circumstantial evidence that the plaintiff had no evidence of a conspiracy.

The answer to ensuring an adequate showing in support of a motion for summary judgement is not to increase the evidentiary burden on the moving party but to require the moving party to lay a sound groundwork for the motion. In the absence of direct evidence, the moving party must prepare a sound circumstantial case. This requires discovery that is

339. *See id.*

340. *See id.* at 730.

341. *See id.* at 731. The court went on to find that defendant's deposition testimony, which plaintiff had introduced, showed that defendant had not spoken with the insurer, did not even know why the insurer picked him to conduct the examination and that this showed that the conspiracy "could not be established." *See id.*

342. *See id.* at 723. The plaintiff had been asked in his deposition whether the only communication of which he was aware was the January 8, 1992, letter from the insurer to the defendant. The plaintiff's answer was not responsive. He stated that *this was the only letter he had seen.* This certainly had no bearing on whether a conspiracy existed.

tailored to the moving party's theory of the case. In *Villa*, it would have included "state all facts" discovery on the issue of the alleged conspiracy.

6. *A Defendant Moving for Summary Judgment on an Issue on Which It Has the Burdens of Proof and Production Must Present Evidence of Sufficient Weight to Shift the Burden of Production*

We have seen that subsection (1) of subdivision (o) requires the plaintiff to produce evidence that not only satisfies the production burden but is of such weight that it shifts the production burden to the defendant.[343] The reason for this is that if the plaintiff does nothing more than to propound evidence that is legally sufficient, it is possible that the defendant has evidence that contradicts the plaintiff's evidence.[344] Granting summary judgment under such circumstances would of course be improper. Thus, the party with the burden of proof and the burden of production at trial, the plaintiff, must produce evidence sufficient to shift the burden of production. This is evidence of such weight that, unless it is contradicted, the plaintiff is entitled to judgment. There are circumstances, however, under which it is the defendant who has the burden of proof and the burden of production. The best illustration of this is where the defendant asserts an affirmative defense.[345]

Here the rule should be the same as it is for plaintiffs under subsection (1) of subdivision (o). If the defendant bases its motion for summary judgment on the affirmative defense, it should do more than support the motion with sufficient evidence. Evidence that is sufficient does not exclude the possibility that the plaintiff has evidence that contradicts the defendant's evidence.[346] Thus, judgment cannot be entered for the defendant based on sufficient evidence. Like the plaintiff, a defendant with the burden of proof and the production burden should be required to produce evidence that shifts the production burden to the plaintiff. That is, the evidence

343. *See* discussion *supra* Part I.D.

344. *See* discussion *supra* Part I.D.

345. *See* CAL. EVID. CODE. § 500 (West 2000). ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting").

346. *See* discussion *supra* Part I.C.

supporting the affirmative defense should be of such weight that, unless that evidence is contradicted, the defendant is entitled to judgment.

The courts of appeals have supported this view. It has been held that the defendant must present evidence of each essential element of the defense on which it bears the burden of proof.[347] Furthermore, evidence supporting the affirmative defense must be of such probative force as to sustain a judgment in the defendant's favor.[348] *Hagen* demonstrates the extent of the burden that must be met when the defendant moves for summary judgment on an affirmative defense under which it bears the burdens of proof and production.[349] In *Hagen*, the defendant moved for summary judgment on the theory that there was a complete defense to the action.[350] In such a case, the defendant will have the burden of proof and the production burden at trial.[351] Interestingly, however, the production burden was allocated to the defendant in *Hagen*, not because of the assertion of an affirmative defense, but because a presumption placed the production burden on the defendant.[352]

Hagen was an action over the validity of a trust brought by two grandchildren against the cousin of the decedent.[353] The latter, Terry Hickenbottom, had received almost all of the property under a revocable living trust.[354] The grandchildren sued to set aside the trust on the theory that Hickenbottom had exercised undue influence over the decedent.[355] Hickenbottom moved for summary judgment and summary

347. *See* Bacon v. Southern Cal. Edison, 62 Cal. Rptr. 2d 16, 18 (Ct. App. 1997) ("[T]he defendant has the initial burden to show that undisputed facts support each element of the affirmative defense.").

348. *See* Huynh v. Ingersoll-Rand, 20 Cal. Rptr. 2d 296, 298 (Ct. App. 1993) (There is no obligation on the plaintiffs part to establish anything by affidavit unless and until defendant has stated facts establishing every element of the affirmative defense necessary to sustain a judgment in his favor).

349. *See* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 198-99 (Ct. App. 1995).

350. *See id.* "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown . . . that there is a complete defense to that cause of action." CAL. CIV. PROC. CODE § 437c(o)(2) (West 2000).

351. *See* WEIL, *supra* note 124, at ¶ 10.247.

352. *See Hagen*, 48 Cal. Rptr. 2d at 204, 208.

353. *See id.* at 198-99.

354. *See id.*

355. *See id.*

adjudication[356] on the ground that her privilege to speak the truth was a complete defense to the action.[357] The trial court concluded that the "defense of truth" privilege constituted a complete defense and entered summary judgment for Hickenbottom.[358]

For a variety of reasons not pertinent hereto, the court of appeals disagreed that this defense was available.[359] This alone could have led to a reversal since the defendant could of course no longer rely on this defense as a matter of law. However, on appeal the defendant also contended that the plaintiffs, in opposing the motion for summary judgment, should have "set forth facts to support their first amended complaint."[360] Relying expressly on *Union Bank,* the defendant contended she was not "required to prove the absence of material facts" and that her burden was to set forth the defense of truth and "point out to the court that no material facts have been presented" by the plaintiffs.[361]

Hickenbottom's argument misconstrued *Union Bank* to have adopted the federal rule, which does not require the moving party to make any evidentiary showing in support of

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356. See CAL. CIV. PROC. CODE § 437c(f)(1), which explains summary adjudication as follows:

> A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

357. *See Hagen*, 48 Cal. Rptr. 2d at 202.

358. *See id.*

359. *See id.* at 203-04.

360. *Id.* at 203.

361. *Id.* at 207. The court said,

> In this court, Hickenbottom argues on the basis of Union Bank that she "has made an adequate 'showing' . . . that [the grandson] has offered no evidence whatsoever that [Hickenbottom] did or said anything wrong. The Union Bank case now confirms what [Hickenbottom] has maintained throughout her opposition, namely that she is not required to prove the absence of material facts. Rather, her burden, which she has fully met, is simply to set forth her affirmative defense of truth and point out to the court that no material facts have been presented by [the grandson].

Id.

the argument that the nonmovant's case is not supported by any evidence.[362] The moving party had made a solid evidentiary showing in *Union Bank*,[363] and *Union Bank* had not dispensed with the need for such a showing.

Be that as it may, it turned out that Hickenbottom had the production burden on the issue of undue influence and the validity of the trust.[364] The court of appeals noted that certain foundational facts activate a presumption of undue influence that, "at trial, would operate to shift the burden of proof to the proponent of the trust or will."[365] This meant that Hickenbottom had the burdens of proof and of production on the issue of the validity of the trust. Hickenbottom had not attempted to negate the foundational facts that created the presumption of undue influence or show that these foundational facts could not be established.[366] Thus, the presumption applied and Hickenbottom was the party with the production burden.[367] In support of the motion for summary judgment, Hickenbottom had submitted a showing that related the course and history of the relationship between the decedent, the grandchildren, and Hickenbottom.[368] The showing was quite detailed and included medical testimony that the decedent's mental capacity was sound at the time she executed the trust that was the subject of the action.[369] In fact, it included evidence that one of the plaintiffs had stated that a full eighteen months after the decedent executed the trust in question, she never observed the decedent being weak minded or unable to make decisions or speak her mind.[370]

If Hickenbottom did not have the burden of production on the issue of undue influence and the validity of the trust, it is likely the showing that she submitted in support of the

362. *See supra* note 16.

363. *See supra* note 195 and accompanying text.

364. *See Hagen*, 48 Cal. Rptr. at 208-09.

365. *Id.* at 202-03, 208. These foundational facts are: existence of a confidential relationship between the testator and the person alleged to have exerted undue influence, active participation by the latter in the preparation or execution of the will, and undue profit accruing to that person. Hickenbottom qualified on all three counts. *See id.*

366. *See id.* at 208.

367. *See id.*

368. *See id.* at 199-201.

369. *See id.*

370. *See Hagen*, 48 Cal. Rptr. at 199-201.

motion would have been sufficient evidence that the decedent had executed the trust out of her own free will and free of Hickenbottom's influence. Thus, if the plaintiffs bore the production burden on these issues and moved for summary judgment, medical testimony as to the decedent's competence and the granddaughter's corroborating testimony would have been substantial evidence that would have defeated the motion.

However, by virtue of the presumption, Hickenbottom had the burden of production on the issues of undue influence and the validity of the trust. Thus, as the party moving for summary judgment, she had to present sufficient evidence to sustain a judgment in her favor. That is, Hickenbottom had to show that the inference on which she relied, that she had not exerted undue influence and that the trust was therefore valid, was the only reasonable inference that could be drawn from the evidentiary facts. And, of course, she would not be entitled to judgment if the inference of undue influence were as probable as the inference of no undue influence.[371]

Measured against this test, Hickenbottom's showing was insufficient.[372] She submitted no facts that bore directly on the issue of undue influence and thus the validity of the trust.[373] For one, she failed to submit a declaration of her own, even though she was the only witness who "was the only percipient witness to much of what she did or did not do to influence the decedent's estate-planning decisions."[374] Thus, she had failed to exclude the wholly reasonable possibility that her proximity and relationship with the decedent allowed her to exercise undue influence.[375] Therefore, it was not surprising that the court concluded that Hickenbottom's showing was insufficient to shift the burden to the plaintiffs to show that there were triable issues of material facts.[376]

Hagen demonstrates the need to recognize that an exception must be made to subsection (2) of subdivision (o) when the defendant moves for a summary judgment on an issue, or issues, on which it has the burdens of proof and

371. *See supra* notes 73-75 and accompanying text.
372. *See Hagen*, 48 Cal. Rptr. at 208-09.
373. *See id.*
374. *Id.* at 208.
375. *See id.* at 204-05, 208-09.
376. *See id.* at 209.

production. When this is the case, the defendant must prove each element of the defense with an evidentiary showing probative enough to sustain a judgment, that is, evidence probative enough to exclude the possibility that a rational finder of fact could return a verdict for the defendant. Alternatively, a judicially crafted exception to subsection (2), subdivision (o) could be amended to predicate the operation of this provision on the allocation of the burdens of proof and production, rather than the position the moving party occupies in the litigation.

II. CONCLUSION

The 1992 and 1993 amendments to section 437c relieved the party moving for summary judgment of the burden of propounding evidence of probative force sufficient to shift the production burden to the opponent, if the summary judgment motion is made by the party who does not have that burden at trial. Since 1992 it is also clear that the moving party does not bear the production burden simply because it has brought the summary judgment motion.

This does not relieve the moving party from its obligation to set forth in a separate statement the material facts it claims are undisputed and to support those facts with references to the evidence. This evidence must be either direct evidence of the proposition or, if circumstantial, the inference the proponent seeks to draw must be more probable than the conflicting inference.

If the motion for summary judgment is made by the party who bears the burdens of proof and production, the evidence in support of the motion must be of a probative force sufficient to shift the burden of production to the opponent. This is evidence of such probative force that no person can reasonably disbelieve it in the absence of countervailing evidence.

In laying down these rules, the 1992 and 1993 amendments to section 437c have brought summary judgment into alignment with the concept of the burden of production and with the shifting of that burden. This is an important step in the development of summary judgment in California.

Quite apart from the important technical innovations achieved by the 1992 and 1993 amendments to section 437c,

these amendments also provide a lesson in the development of legal principles in a common law jurisdiction. The impetus for these legislative enactments was a judicial decision, *Celotex Corp.*, and dissatisfaction with another judicially crafted rule as expressed in *Barnes*. The legislature enacted the 1992 and 1993 amendments in reaction to *Celotex* and *Barnes* and then retired from the scene, leaving it to the courts to test these amendments in the crucible of actual cases. This the courts have done with some success during the last five years. It may be that this normative dialogue between the legislative and judicial branches illustrates one of the great strengths of the common law.